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No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,
Defendant in Error.

SUPPLEMENT TO DEFENDANT IN ERROR'S BRIEF ON RE-ARGUMENT

In Error to the United States District Court for the Northern District of California, Second Division.

HOEFLER, COOK, HARWOOD & MORRIS,
ALFRED J. HARWOOD,
Attorneys for Defendant in Error.

No. 2643.

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At the re-argument on May 24th, the Court ordered that both parties should file their briefs within fifteen days. The brief of Defendant in Error on Re-Argument (filed on June 26th) was printed and ready for filing on June 8th, but on that date counsel for Plaintiff in Error stated that their brief was not yet completed, whereupon it was stipulated by us that the time should be extended for five days. Subsequently, at the request of counsel for Plaintiff in Error, the

time was further extended. As we had prepared our brief within the period of fifteen days and as the last extension requested by counsel had the effect of allowing them thirty days' time for their brief, we requested counsel to stipulate that we might (if we so desired) file a supplement to our brief on re-argument. This supplement to our brief on re-argument is filed in pursuance of that stipulation.

In the brief of Plaintiff in Error last filed (p. 40) the contention is again made that "the orders of the Commission entered after October 10, 1911, preserving the *status quo* may be sustained as rate fixing orders under the provisions of the Eshleman Act giving the Commission the power to fix rates."

This contention was replied to at pages 118 to 123 of Brief of Defendant in Error first filed.

It was there pointed out that the orders referred to do not purport to establish any rates and it was further shown that the Commission had no power to establish rates violative of the prohibition except upon application of the carrier and after investigation of the carrier's application. The carrier was obliged to prove its case and to show not only a valid excuse for the lower rate for the longer distance but also that the rate to the intermediate point was reasonable. The provisions of the amended Section 21 of Article XII of the Constitution are mandatory

and prohibitory; they provide the way in which a carrier can obtain the sanction of the Commission to the charging of higher rates to intermediate points. The amended Section 21 provides that "It shall be unlawful * * * to charge or receive greater compensation * * * for a shorter than for a longer distance." If that had been the entire provision the Commission could not have established any higher rates to less distant points; but that was not the entire provision. There was added the proviso that upon application of a carrier, and after investigation, the Commission might in special cases authorize the charging of higher rates to intermediate points. Upon the clearest principles of statutory construction the proviso must be construed as exclusive of any other means of obtaining relief. Proof that a rate was "established" by the Commission is not proof that the rate (violative of the long and short haul clause) is legal because it is not proof that it was authorized by the Commission in pursuance of the provisions of Section 21 of Article XII of the Constitution. If it had been the intention that the Commission could establish rates violative of the prohibition without the application of the carrier and the investigation of the Commission, such intention would have been evidenced by another proviso to the effect that a carrier might charge higher rates to the intermediate points in cases where such higher rates

were established by the Commission. But the section does not contain such a proviso.

If the Commission could establish rates violative of the prohibition of Section 21 of Article XII in the absence of the application and investigation required by that section the long and short haul prohibition would be practically nullified. If that were the proper construction of the prohibition a carrier might file a tariff containing rates violative of the prohibition and the Commission might "approve" the tariff and all rates in the tariff in violation of the prohibition would be legal notwithstanding that some of them might be violative of the prohibition. The prohibition would be reduced to a mere rule for the guidance of the Commission in establishing rates.

When the Commission establishes a rate it considers whether or not that rate is reasonable, but when it investigates an application under Section 21 of Article XII, it not only considers the reasonableness of the rate, but also another rate, that is, the lower rate to the more distant point. With reference to the last mentioned rate the Commission determines the sufficiency of the alleged excuse for maintaining a lower rate to the more distant point. It also considers the relation of the two rates and the question as to whether the lower rate to the more distant point is likely to unduly burden the traffic to the less distant point.

Let us assume that the Commission initiated a proceeding to establish rates from San Francisco to Fresno. They would receive evidence as to what was a reasonable rate for the service. They might or they might not have brought to their attention the rates charged by the carrier to more distant points. Both Congress and the people of California deemed that there should be almost an absolute prohibition against charging more for the shorter distance. They clearly indicated the method by which relief could be obtained from this prohibition. It necessarily follows that that method must be pursued.

We have already seen that the orders made after October 10, 1911, do not purport to grant any of the applications of the carriers, but merely purport to allow the carriers to file supplements to their tariffs containing higher rates to intermediate points.

We have also seen (assuming for the sake of the argument that they did purport to grant such applications) that they affirmatively show that they were not preceded by the investigation required by the Constitution, and that they are ineffective as orders of relief because made without investigation. It is contended that they could be sustained as "rate fixing orders." But they would not purport to fix any rates. They would merely purport to authorize the carrier to charge higher rates to the intermediate

points, and coupled with this authorization would be a statement that the Commission "does not concede the reasonableness of any of the higher rates or fares to intermediate points, all of which rates and fares will be subject to investigation and correction."

In *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677 (p. 54 of last brief filed by Plaintiff in Error) the Commission with reference to the orders made after October 10, 1911, said:

> "The Commission did not, however, by these orders sanction or approve any of the rates covered by the defendant's application which were in violation of the long and short haul provision. *In fact, it expressly withheld its approval of such rates.*"

It is obvious that the orders of November 20, 1911, and January 16, 1912, cannot be distorted into "rate fixing orders." An order purporting to establish rates which recited that the Commission did not concede the reasonableness of the rate sought to be established would not be an order establishing a rate. It would show affirmatively that the very matter which the Commission was called upon to determine before it established the rate had not in fact been determined.

An intention to establish rates would not appear from an order which recites that the reasonableness

of the rates had not been ascertained by the Commission.

From another provision of the orders of November 20, 1911, and January 16, 1912, it is clear that the orders did not purport to "establish" any rates. These orders merely purport to grant the carrier permission to "file *for establishment* with the Commission in the manner prescribed by law and in accordance with the Commission's regulations such changes in rates and fares as would occur in the ordinary course of their business," etc. (Record, p. 404 and p. 424.)

The changes which the carriers were permitted thereafter to file were not "established" by the orders of November 20, 1911, and January 16, 1912, but were merely permitted to be filed "for establishment" thereafter by the Commission. There is no pretense that any rates here involved were contained in any such supplements filed by the carrier or that any such rates were thereafter established by the Commission.

We have seen that the orders made by the Commission since October 10, 1911 (to wit, the orders of October 26, 1911, November 20, 1911, and January 16, 1912) do not purport to grant any of the applications of the carriers. They merely relate to the filing by the carriers of supplements to their tariffs.

The Commission, however, contends that the orders were made to preserve the so-called "*status quo.*" In the case of *Phoenix Milling Co. v. S. P. Co.,* 7 C. R. C. 677, cited by Plaintiff in Error, the Commission said:

> "By this order (the reference is to the order of October 26, 1911) the carriers were impliedly granted permission for practical reasons *to maintain the* status quo *until the Commission passed upon such applications.* By a subsequent order issued on November 20, 1911, in the same proceeding, express permission so to do was given."

The orders made after October 10, 1911, did not purport to establish any rates.

Beyond question these orders were made because of the erroneous views entertained by the Commission with reference to the effect of Section 21 of Article XII of the Constitution as amended October 10, 1911. The Commission erroneously assumed that the Constitutional prohibition was not effective until the Commission so ordered. They deemed these orders were proper before carriers should be permitted to file changes in or supplements to their tariffs containing higher rates to intermediate points.

The Commission in *Phoenix Milling Co. v. S. P. Co., supra,* states that the orders were made for the purpose of "maintaining the *status quo*" pending investigation.

But whether they were made with the one intention or the other, it is most obvious that they were not intended to be "rate fixing orders."

It cannot be said that orders made with the intention of preserving the *"status quo"* pending investigation can be upheld as "rate fixing orders." The Commission had no power to preserve the so-called *"status quo"* and the orders made were not worth the paper upon which they were written.

The intention of the Commission (according to its contention) was to preserve the so-called *"status quo"* pending investigation. The Commission had no authority to make such an order. The intention was illegal. The orders were made (assuming for the purpose of the argument that the Commission's contention as to why they were made is correct) for an illegal purpose—for a purpose which could not be accomplished.

The proposition that such orders, which could not, under the law, to any extent whatsoever carry out the intention of the Commission, can be sustained as "rate fixing orders" is startling.

Because the Commission deemed it had the power to preserve the so-called *"status quo"* pending investigation, and made an order intended to have the effect of preserving the *"status quo,"* it by no means follows that the Commission desired to establish the

rates which the carriers were then claiming the right to charge.

If the Commission had known that it could not thus maintain the *"status quo"* it is clear that the orders would not have been made at all. There is absolutely no reason for assuming that if the Commission had known it could not thus preserve the *"status quo"* it nevertheless would have established rates violative of the Constitutional prohibition. If the Commission had been correctly advised as to the law, instead of attempting to establish rates violative of the prohibition, it doubtless would have proceeded to a determination of the applications of the carriers for relief and pending the determination of the applications would have required the carriers to obey the law. There is no reason to suppose that it would have attempted to establish any rates violative of the prohibition pending the determination of the applications of the carriers.

The contention that the orders made after October 10, 1911, "may be sustained as rate fixing orders" is unsound for each of the following independent reasons:

1. A rate violative of the prohibition can be legalized only after the application and investigation required by Section 21 of Article XII. The method there prescribed is exclusive.

2. The orders referred to do not purport to establish any rates. They merely purport to grant the carriers permission to "file *for establishment* with the Commission in the manner prescribed by law and in accordance with the Commission's regulations such changes in rates and fares as would occur in the ordinary course of their business." (Record p. 404 and p. 424.) The rates filed in pursuance of the orders were to be *thereafter* established by the Commission.

3. The orders referred to show affirmatively that the Commission had not passed upon the reasonableness of the rates involved. An order which affirmatively shows that the Commission had not passed upon the reasonableness of the rates cannot be construed to be a "rate fixing order."

4. The Commission contends that the orders referred to were made for the purpose of preserving the so-called *"status quo"* pending the investigation required by the Constitution. Considered as such orders they were illegal and void. There is no reason to suppose that if the Commission has been correctly advised as to the law and had known that it could not preserve the so-called *"status quo"* pending investigation it nevertheless would have established rates which it knew were illegal.

The opinion in the case of *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677, printed at pages 46 *et seq.* of the last brief filed by Plaintiff in Error, confirms our statement that the Commission assumed it could read into Section 21 of Article XII a provision similar to the second proviso of the 4th Section of the Act of Congress. It appears therefrom (p. 48) that in at-

tempting to preserve the so-called "*status quo*" the Commission thought that it was "following the procedure of the Interstate Commerce Commission in similar matters." Now, as we have seen, the "procedure" of the Interstate Commerce Commission was based upon the second proviso of the 4th Section, which proviso was not adopted into Section 21 of Article XII of the Constitution. The ~~preservation of the~~ *status quo* of interstate rates was not preserved by any action or procedure of the Commission, but by the terms of the Act of Congress itself.

In the last brief filed by Plaintiff in Error, the statement is made that we did not answer the argument to the effect "that by making the Eshleman Act a part of the Constitution" the Legislature intended to prevent the "business confusion and chaos" which counsel say would result from the immediate operation of the Constitution as amended October 10, 1911.

This contention is replied to at pages 27 to 27b of the last brief filed by Defendant in Error, and also at pages 59 to 64 and 72 to 76 of Supplemental Brief of Defendant in Error.

The provisions of the Eshleman Act mentioned by counsel are referred to at pages 104-105 and 119-122 of Defendant in Error's first brief, at pages 48-54 of Defendant in Error's Supplemental Brief and at

pages 8-26 of Defendant in Error's Brief on Reargument.

Referring to the supposed case of a carrier who started in business after the amendment to the Constitution of October 10, 1911, counsel state:

> "The carrier might, as it probably would in the case supposed by counsel, go to the Commission with a schedule of rates which it thought was reasonable and just, and ask the Commission to adopt those rates, or such modification thereof as the Commission might think proper."

After making the foregoing statement counsel contend that a higher rate to the intermediate point specified in such schedules would be legal.

Now we did not suppose that counsel would attempt to answer the argument in any other way. To have conceded that such a rate was illegal would have been an admission that the so-called "existing" rates would become illegal upon the adoption of the amendment to the Constitution of October 10, 1911.

It is obvious that a carrier starting in business after October 10, 1911, would be required to "go to the Commission" with a schedule which did not contain rates violative of the Constitutional prohibition. If such carrier desired to obtain authority to charge higher rates to intermediate points, authority to do so would have to be sought and obtained in the manner provided in Section 21 of Article XII of the

Constitution. An order of the Commission "adopting" a schedule specifying higher rates to intermediate points would not render such rates legal, as that is not the manner in which such rates can be legalized under the Constitution as amended.

The case of *Kellogg v. Michigan Central,* 24 I. C. C. 604, which is referred to at page 13 of the printed copy of the second oral argument filed by Plaintiff in Error was not actually cited at the oral argument; hence it was not referred to in our Brief on Re-argument. In that case the Commission did not, as stated by counsel, hold that there was "no warrant for the violation of the 4th section." That is, they did not hold that in the past there was no warrant for the violation of the section, but merely held that there was no warrant for the continuance of the violation.

From the opinion of the Commission it would seem that the rate in question, which was in effect on and prior to June 18, 1910, the date of the amendment to Section 4, was continued in force by an application for relief. The case of *Kellogg v. Michigan Central, supra,* was not an application for relief under the provisions of the fourth section, but was a complaint to have a rate reduced because of alleged discrimination. The Commission said (p. 606):

> "It is unjustly discriminatory against Battle Creek and complainant to charge higher rates

on this traffic to Battle Creek than to Detroit, Toledo and Cleveland."

All that the Commission said was that as to rates to be charged in the future there was no warrant for a departure from the prohibition of the 4th section—that is, that there was no warrant for the continuance of the violation of the 4th section. The 4th section provides that no rates lawfully existing at the time of the passage of the amendment to the section should be required to be changed "by reason of the provisions of this section" until after the expiration of six months or where applications for relief are pending.

Counsel for plaintiff in error in referring to *Merchants & Manufacturers Traffic Assn. v. U. S. et al.*, 231 Fed. 292, state that the decision was by a divided court. The decision in the case at bar does not in any manner depend upon the decision in that case and whether the majority of the court or the dissenting judge is right is immaterial here. At page 22 of our Brief on Re-argument we quoted from the decision of the court to the effect the Commission cannot "suspend the long and short haul clause of Section 4 of the Act to Regulate Commerce without an application being made to it by the carriers for that purpose and a hearing upon that particular application as in a special case."

The decision was cited as authority for the self-evident proposition that an investigation was a necessary prerequisite to an order of relief. Judge Bledsoe, who dissented from the decision of the court, did not disagree with this view but expressly coincided with it. Judge Bledsoe said:

> "It was the judgment of the Commission, *after investigation*, that was to warrant the setting aside of the statutory rule, and the provision for the making of an 'application' was intended merely as a means of securing such investigation and judgment. The making of an application by the carrier was of the form, perhaps, but not of the substance of the proceeding; it was a mere means to an end, and should not, in my judgment, be confounded with the end itself."

The majority of the court held that in addition to the investigation an application was necessary. Judge Bledsoe dissented from this view but all the judges held that an *investigation* was a necessary prerequisite to an order of relief.

We are not really concerned in the case at bar with the question as to whether an application is required to be filed before an order of relief can be made.

It is clear, however, that whether or not an application is required by the Act of Congress, it is required by Section 21 of Article XII of the Constitution of California. The provisions of the Constitution are mandatory and prohibitory; those of the Act of Congress may be directory merely. Judge Bledsoe was

of the opinion that the provision of the Act of Congress requiring an application was directory; but our Constitution could not be so construed.

Section 22, Article I of Constitution.
Matter of Maguire, 57 Cal. 604.
Knight v. Martin, 128 Cal. 245.
McDonald v. Patterson, 54 Cal. 247.
Navajo Mining Co. v. Curry, 147 Cal. 581.

With reference to the decision in *Merchants etc. Assn. v. U. S., supra,* counsel in their last brief state that we were in error in stating at the oral argument that there was no difference of opinion and no question so far as the regularity of the Commission's investigation was concerned. The statement is then made that this is one of the main questions in the case.

Both the opinion of the court and the dissenting opinion assume that there was an investigation. There is nothing in either opinion which would indicate that there was any question as to whether or not there had been an investigation. The only point decided by the court was that the order was void because not preceded by an application. Judge Bledsoe in his dissenting opinion said:

> "In the case at bar it stands as indubitably true that a hearing and extended investigation was had by the Commission, and that their conclusions embraced in the order complained of were the result of most careful consideration."

Doubtless in presenting their application to the Supreme Court for a writ of supersedeas, counsel for

the carriers relied upon the fact that an investigation had been made by the Interstate Commerce Commission, and they doubtless argued that under the Interstate Commerce Act the provision requiring an application was directory merely. But we do not think that they argued that an order of relief made without investigation was valid. It was not incumbent upon them to do so, as the evidence in the case undoubtedly showed that there had been an investigation.

Respectfully submitted,

HOEFLER, COOK, HARWOOD & MORRIS,
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Attorneys for Defendant in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error.

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation
Defendant in Error.

PETITION FOR REHEARING

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PETITION FOR REHEARING

TO THE HONORABLE,
THE JUDGES OF THE CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT:

SOUTHERN PACIFIC COMPANY, plaintiff in error, pursuant to Rule 29 of this Court, respectfully petitions that a rehearing be granted of the decision rendered by this Court affirming the judgment rendered by the United States District Court for the Northern District of California.

The grounds upon which said rehearing is asked are as follows:

That the Railroad Commission of the State of California, which has been constituted a Court of last resort by the Constitution of the State of California, has rendered decisions which are final and from which there is no appeal, deciding that the Southern Pacific Company filed with the Railroad Commission of the State of California applications sufficient in form and substance, for relief from the provisions of the Long and Short Haul Clause of the Constitution, as amended October 10, 1911; and that the Railroad Commission of the State of California has, after investigation, entered an order relieving the plaintiff in error from the provisions of said Long and Short Haul Clause.

That these decisions of the Commission, interpreting the Constitution and determining the question whether Southern Pacific Company has been relieved from the operation of the Long and Short Haul Clause of the Constitution, are binding upon this Court and the trial Court, and that this Court should therefore have adopted the interpretation placed upon the Constitution by the Commission and accepted its findings of fact, decisions and orders as conclusive of the questions involved, and should have rendered its decision in accordance therewith and reversed the judgment herein.

The Railroad Commission of the State of California has rendered decisions which are final and

from which there is no appeal, deciding that no reparation can be recovered under the provisions of the Long and Short Haul Clause of the Constitution of 1879, on shipments moving prior to the Constitutional amendment of October 10, 1911, where rates have been established by said Commission; and that as it appears from the record that the rates involved in the controversy, applying on traffic which moved prior to October 10, 1911, were established and approved by the Commission, this Court should have accepted the Commisson's interpretation of the constitution and reversed said judgment.

That the decision of this court challenges and practically overrules the construction uniformly given to the California constitution for more than thirty-five years by the bench and bar, carriers and shippers alike.

That the decision of this court disregards the decisions of the California Railroad Commission, which as a "court of last resort" has uniformly held that, while charging rates to intermediate points higher than to more distant points is apparently in violation of the constitutional prohibition (Sec. 21, Article XII, Constitution 1879), the carriers were nevertheless justified and in fact required to charge rates "established and published" by the Railroad Commission in conformity with the "duty" imposed upon the Commission by the Constitution itself to "establish and publish" such rates, which in all

"controversies," civil or criminal, were declared by the Constitution to be "conclusively just and reasonable." (Sec. 22, Article XII, Constitution 1879);

That the decision of this court disregards the decisions holding that the rates established by the Commission pursuant to the "duty" imposed upon it by the Constitution of 1879, and the rates established under the Wright Act and the Eshleman Act and which were continued in effect by the constitutional amendment, are conclusively just and reasonable;

That the decision of this court declares to be erroneous and unlawful a construction of the constitution and statutes which has never heretofore been questioned or challenged, and requires the carriers to repay to shippers many thousands of dollars in violation of rates which the constitution declared shall be "conclusively just and reasonable," and which have been "established and published" by the Commission, and which have been uniformly observed;

That the decision of the court ignores the fundamental and controlling principle established by the decisions of the Federal courts, that this court is bound by the construction placed upon the constitution and statutes of California by the court of last resort, which here is the Railroad Commission of the State of California.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HAS BEEN CONSTITUTED A COURT OF LAST RESORT, AND ITS DECISIONS IN CASES SUCH AS THIS ARE FINAL AND NOT REVIEWABLE.

The Supreme Court of the State of California has held that it has been established "beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising *judicial* functions of great moment. * * * * *"*

Pacific Tel. etc. Co. vs. Eshleman, 166 Cal., 640, 650.

It was further held, by the adoption of the amendment to Section 22 of Article XII of the California Constitution, "that there is the fullest possible grant of authority (to the Legislature) to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the Legislature in the Commission shall not be inconsistent with the constitutional powers conferred; that this means and can only mean that the Legislature may not curtail any of the powers vested by the Constitution in the Railroad Commission, but that the legislative authority to confer any kind of additional powers is, and is expressly declared to be, 'plenary and unlimited by any provision of this constitution'; further, that the people, in enacting these constitutional amendments designedly and deliberately did this thing, to the end that the Railroad Commission thus constituted should have its

labors unvexed and their results untrammeled by the Courts of this State."

Idem, pp. 654-5.

The Court further said:

"In view of these considerations we regard the conclusion as irresistible that the constitution of this State has in unmistakable language created a Commission having control of the public utilities of the state, and has authorized the legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges and immunities guaranteed by the constitution to all other kinds of property and its owners. * * *

It is perhaps the first instance where a constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions. * * * *

The State of California has decreed that in all matters touching public utilities the voice of the legislature shall be the supreme law of the land. * * * *

Therefore, the following conclusions appear to be irresistible: *That when the constitution itself, as here, declares that a legislative enactment touching a given subject shall not be controlled by any provisions of the written constitution, such a legislative enactment addressed to that subject ex proprio vigore carries with it all the force of an act of parliament.* (pp. 658-9)

(Italics ours.)

The Supreme Court of the State of California definitely decided in that case, that except in so far

as the Federal Constitution may be involved and except in determining whether the Commission has acted within its jurisdiction, the Supreme Court of the State of California, and all other Courts of the State, are divested of all jurisdiction to review the orders or decisions of the Railroad Commission of the State of California.

The complaint of defendant in error is not based upon any provision of the Federal Constitution. No claim is made that any right founded upon the Federal Constitution has been impaired and no such cause of action was pleaded in the complaint. Therefore the appellate court may not consider any such question on appeal.

Cox vs. Texas, 202 *U. S.* 446;
Chesapeake & Ohio R. Co. vs. McDonald, 214 *U. S.* 191;
Southwestern Oil Co. vs. Texas, 217 *U. S.* 114, 118.

The jurisdiction of the Federal Courts was invoked solely upon the diversity of citizenship of the parties.

The complaint is predicated exclusively upon the constitution and statutory law of the State, and the rights of defendant in error must be determined under the law of the State of California as found in its constitution and statutes, as they have been construed and determined by the Railroad Commission of the State of California, the "court" of last resort.

In deciding the *Telephone Case, supra,* the Supreme Court of the State of California did no more than determine whether violence had been done to the provisions of the Federal Constitution. The Court concludes:

> "1—The constitution has, in the railroad commission created both a court and an administrative tribunal.
>
> 2—The constitution has authorized the legislature to confer additional and different powers upon this commission touching public utilities unrestrained by other constitutional provisions.
>
> 3—The legality of such powers as the legislature has or may thus confer upon the commission, if cognate and germane to the subject of public utilities, may not be questioned under the state constitution.
>
> 4—That therefore the deprivation of jurisdiction of the courts of the state may not be questioned.
>
> 5—That therefore the reasonableness of the railroad commission's orders and decrees may not be inquired into by any court of this state and consequently is of federal cognizance only." (p. 689.)

Mr. Justice Sloss, in his concurring opinion, holds that:

> "If the legislature has plenary power to confer powers upon the railroad commission, it may declare that the orders of the railroad commission shall be final and conclusive and not subject to review by any court of this State." (pp. 691-2.)

In deciding the case of *Oro Electric Corporation vs. Railroad Commission of the State of California*, 169 Cal., 466, 471, the Court held:

> "The validity of section 67 of the Public Utilities Act, in so far as it limits the scope of review by state courts of the acts of the commission, must be regarded as finally settled by the telephone company case. By that section, *the findings and conclusion of the commission on questions of fact are made final and not subject to review.*" (Italics ours)

UNDER THE DECISIONS OF THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, CONSTRUING THE CONSTITUTION, THE RATES AND PRACTICES COMPLAINED OF ARE LAWFUL, AND THERE CAN BE NO RECOVERY IN CASES SUCH AS THIS.

CAUSES OF ACTION ARISING SUBSEQUENT TO OCTOBER 10, 1911.

The Commission has definitely and finally decided:

(a) That the plaintiff in error regularly filed applications, sufficient in form and substance, for relief from the provisions of the Long and Short Haul Clause of the Constitution, as amended October 10, 1911.

(b) That the Commission has held an investigation, as contemplated by the Constitution, to determine whether plaintiff in error should be relieved from the operation of said Long and Short Haul Clause.

(c) That the Railroad Commission of the State of California has authorized the carriers to deviate from the said Long and Short Haul Clause.

ORDERS ENTERED BY THE COMMISSION.

The record in the case at bar discloses that on October 26, 1911, the Commission entered an order requiring all carriers "to present to this Commission on or before the 2nd day of January, 1912, for examination and investigation by this Commission, a new schedule or schedules removing said deviations from the provisions of said section of the Constitution of this State, or in case it is desired to justify the same, or any of them, an application or applications to be relieved from the provisions of said section", prescribing the form. (Tr. p. 401.)

A second order was issued by the Commission, under date of November 20, 1911, authorizing the carriers to file such schedules with the Commission on or before January 2, 1912, and to continue existing rates in effect. (Tr. p. 404.)

Thereafter, upon the 30th day of December, 1911, the Southern Pacific Company filed applications pursuant to the orders of the Commission. (Tr. pp. 407-422.)

A hearing was had by the Commission to investigate the applications on the 2nd day of January, 1912. (Tr. pp. 423-4.)

Thereafter, to-wit, on the 16th day of January, 1912, the Commission extended the time to February

15, 1912, within which carriers might file such applications, and decided that if such schedules were not filed within the time specified, the Long and Short Haul Clause of the Constitution would become operative, expressly holding that if applications were filed as ordered the operation of the Long and Short Haul Clause would be suspended. (Tr. p. 425.)

LITIGATED CASES ADJUDICATED BY THE COMMISSION RELATING TO TRAFFIC MOVING SUBSEQUENT TO OCTOBER 10, 1911.

The Commission has definitely and finally construed these orders and determined the scope and effect of proceedings thereunder.

In the case of *Scott, Magner & Miller, et al, vs. Western Pacific Railway Co.*, 2 California Railroad Commission Reports, 626, 635, it was held:

> "Acting under the authority granted by section 21 of Article XII of the constitution as amended, the Commission heretofore, on February 15, 1912, issued its order in Case No. 214, authorizing the carriers of the State to continue their deviations from the long and short haul clause until the Commission could determine definitely the instance, if any, in which it will permit deviations to continue to be made. *While the Commission's order authorizing the temporary continuance of the deviations remains in effect, no cause of action can arise from alleged violations of the long and short haul provision of the Constitution.*' (Italics ours)

Again, in the case of *Phoenix Milling Co. vs. Southern Pacific Company*, 7 *C. R. C.*, 677, 682, the Commission held:

> "The Commission's order of October 26, 1911, in the long and short haul proceeding (Case 214) issued under authority of section 21, Article XII of the Constitution as amended on October 10, 1911, and in pursuance to which the defendant's application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. By this order the carriers were impliedly granted permission, for practical reasons, to maintain the *status quo* until the Commission passed upon such applications. By a subsequent order issued on November 20, 1912, in the same proceeding, *express permission so to do was given.*

In the case of *Fresno Traffic Association vs. Southern Pacific Company, et al*, 8 *C. R. C.*, 390, involving precisely the same questions as were submitted to the Court in the case at bar, and shipments moving between identically the same points, the Commission held that:

> "The *sole question*, therefore, to be decided in this proceeding is whether the carriers violated the provisions of the long and short clause of the Constitution and Public Utilities Act in assessing and collecting higher rates on said shipments between San Francisco and Fresno

than the carriers collected on similar shipments between San Francisco and Los Angeles, or whether any action taken by the Railroad Commission of the State of California, hereinafter designated as the Commission, relieved the defendant carriers from the obligation of observing the long and short haul provisions on said shipments."

The Commission recites that on October 26, 1911, the carriers were notified to file with the Commission all rates not in conformity with the Long and Short Haul clause, and to designate wherein the carriers desired to deviate from the provisions of the Long and Short Haul Clause. It was decided that:

> "On February 15, 1912, the Commission issued an order authorizing the carriers to continue deviations from the long and short haul clause until the petitions had been finally passed upon by the Commission.

The significant and conclusive finding was made by the Commission that:

> "Previous to said order of February 15, 1912, an extended investigation was made by the Rate Department of the Commission, under the Commission's instructions and supervision, with reference to the deviations from the long and short haul clause, on the part of the carriers, including the defendants herein, as shown by said petitions.
>
> The evidence in this proceeding shows clearly that the investigations thus conducted by the

Rate Department were extended and exhaustive, and that frequent conferences on this subject were held, as the investigation proceeded, between the Commission and its Rate Department, prior to the order of February 15, 1912. This investigation, as shown by the evidence herein, covered not merely the general subject, but also was specifically directed to the individual deviations shown in the petitions of the carriers. The order of February 15, 1912, was based upon these investigations.

Complainant's claims in this proceeding are accordingly without merit.

As this Commission has, after investigation, authorized the carriers, pending the further order of the Commission, to continue the deviations from the long and short haul clause herein involved, and as the question of the violation of the long and short haul clause is the sole basis for the claim of reparation herein, the complaint should be dismissed."

On the 19th of June, 1916, the Commission entered its final orders in re *The Matter of the Application of Southern Pacific Company*, etc., for relief from the Long and Short Haul provisions of Section 21, Article XII, of the Constitution of California, and Section 24 (a) of the Public Utilities Act, relating to Class Rates, *Decision No.* 3436, *Case No.* 214-A, (not yet reported); and in re *Application of Southern Pacific Company* for relief from Long and Short Haul provisions of Section 21, Article XII, of the Constitution of California, and Section 24-(a) of the Public Utilities Act, relating to Inter-

mediate Commodity Rates, *Decision No.* 3440, *Case No.* 214-*E*, (not yet reported,) wherein it was recited that the applications were regularly filed. The Commission held that:

> "Discrimination is a *question of fact*, and whether it be undue and illegal is also a *question of fact* and the Constitution and the Public Utilities Act (Sec. 24-a) have imposed upon this *Commission* the duty of determining these *questions of facts. Acting within its authority, the ruling of this Commission in this regard is conclusive.* (Public Utilities Act, Sec. 67.)" (Italics ours)

The Commission finds, and they are the sole judges of the fact, that:

> "A number of hearings were held in San Francisco, and the carriers and the shipping public given full opportunity to present their views in connection with the rates. *As a result of the hearings and investigations the Commission issued an order February* 15, 1912, authorizing the carriers to continue in effect rates in violation of the Constitution until such time as the Commission reached a final conclusion in each individual case."

The orders, predicated upon the findings of fact made by the Commission, are as follows:

> "*It is hereby ordered* that the Southern Pacific Company and its connections, such connections arising from membership in the Pacific Freight Tariff Bureau, be and they are hereby authorized to continue class rates as set forth

in the applications and exhibits referred to in said opinion and maintain higher rates at intermediate points, except that the discrimination in rates to and from South Vallejo and Napa, referred to in Exhibits Nos. 1 and 2, be removed and applications covered by Exhibit No. 4 be denied; provided that this authorization shall not be construed to pass on the reasonableness of the intermediate rates or any other matter except the application of the long and short haul clause of the State Constitution and the Public Utilities Act." (Case 214-A).

"*It is hereby ordered* that the Southern Pacific Company and its connections, such connections arising from membership in the Pacific Freight Tariff Bureau, be and they are hereby authorized to continue commodity rates as set forth in the applications and exhibits referred to in said opinion and maintain higher rates at intermediate points, provided that this authorization shall not be construed to pass on the reasonableness of the intermediate rates or any other matter, except the application of the long and short haul clause of the State Constitution and the Public Utilities Act." (Case 214-E).

It thus conclusively appears that plaintiff in error filed with the Commission, in accordance with the rules promulgated by the Commission, applications to be relieved from the operation of the Long and Short Haul Clause of the Constitution; and that the Commission entered upon an investigation of the rates involved, and *after investigation* entered an order expressly authorizing the carriers to deviate from the Long and Short Haul Clause of the Constitution and Statute.

These decisions of the Commission are final, and no appeal lies therefrom.

Pacific Tel. & Tel. Co. vs. Eshelman, 166 *Cal.*, 640.

Intermountain Cases, 234 *U. S.*, 476

In deciding these questions it was necessary for the Commission to determine the *questions of fact* and as the court held in the case of *Oro Electric Corporation vs. Railroad Commission, supra*

> *"The findings and conclusions of the Commission on questions of fact are made final and not subject to review.*

The trial court overruled plaintiff's demurrer to defendant's special defense Number Seven, pleaded in the answer, and recognized that if the allegations were supported by evidence that the defendant was entitled to judgment. The record disclosed conclusively that the Commission, after investigation, and after petitions had been filed by defendant, authorized defendant to charge more for the shorter distance to the intermediate points between San Francisco and Los Angeles than for the longer distance in the same direction, and as this evidence was not controverted, defendant was entitled to a judgment. In this respect the evidence wholly failed to sustain the court's finding that:

> "Nor is it true, that, as alleged in defendant's seventh further and separate defense contained in its answer, that as to each and all or any of the shipments referred to in plaintiff's separately stated causes of action, which

> moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII of the Constitution of the State of California, as amended October 10, 1911, or otherwise, authorized defendant, after investigation, or at all, to charge more for the shorter distance to the point between San Francisco and Los Angeles to which such shipment was transported, than for the longer distance in the same direction." (Tr. p. 359)

The Commission has repeatedly and consistently held in the decisions to which we have referred that applications sufficient in form and substance were filed, and that, after investigation, it authorized the deviation from the long and short haul provisions of the Constitution, and that being a finding of fact, is not open to review in this action.

CAUSES OF ACTION ARISING PRIOR TO OCTOBER 10, 1911.

The Railroad Commission of the State of California has rendered decisions which are final and from which no appeal can be prosecuted, deciding that there can be no recovery under the provisions of Section 21 of Article XII of the Constitution of 1879, on shipments moving under rates which had been "established and published" by the Commission under the provisions of Section 22 of the same article and the record in the case at bar shows that the Commission has approved the tariffs relating to the traffic involved in this controversy.

The record in the case at bar discloses, with reference to shipments moving prior to October 10, 1911, that upon June 11, 1909, the Railroad Commission of the State of California unanimously adopted a resolution reciting that the plaintiff in error, among other carriers, had filed with the Commission a copy of the schedules showing rates for the transportation of freight and passengers between points within the State of California, and "that the aforesaid schedules be and the same are hereby received and filed with this Commission as the rates, fares and charges, * * * * which have been made and filed by the said carriers respectively, pursuant to the provisions of Section 18, of the Act of the Legislature of this State, approved March 20, 1909; and that the said rates, fares and charges *shall* be published by said carriers respectively as required by said Act, and *shall be the lawful rates*, fares and charges of said carriers respectively, subject to be changed as in said section provided, or by this Commission pursuant to the provisions of Section 19 of the aforesaid Act." (Trans. p. 447). This resolution embraces the rates complained of in this proceeding.

So far as the rates involved in this controversy are concerned, a formal proceeding was instituted before the Commission, complaining of the inherent and relative reasonableness of the rates charged by the Southern Pacific Company, and the Commission, after an exhaustive investigation, on December 24, 1910, ordered the carriers to make an adjustment

of the rates between San Francisco, Stockton, Los Angeles and San Joaquin Valley points, the order to become effective February 15, 1911.

Thereafter, a rehearing was requested by certain parties to the original proceeding, and upon March 28, 1912, the Commission entered an order, again prescribing the relation of terminal and intermediate rates between those points, which applied precisely to the same territory as is involved in the case at bar, specifically prescribing the rates to be established "as just and reasonable rates to be observed by the Southern Pacific Company * * * * *". (Tr. p. 428.)

Traffic Bureau of the Merchants Exchange vs. S. P. Co., et al, 1 C. R. C., 95.

The Commission held:

> "In order that there may be no misapprehension on the part of the carriers involved as to the scope of this decision, we have, as already indicated, prescribed the actual rates to be charged between all points involved, and as to such rates there can be no confusion." (p. 96.)

The Commission directed the carriers' attention to the provisions of Section 21 of Article XII of the Constitution, and admonished the carriers not to violate this provision of the Constitution, except in the particulars permitted by the Commission.

It thus appears that the Commission, by formal orders, and in one instance, in a contested proceeding brought before them, definitely and finally

prescribed the charges that should be made for transporting freight between the points involved in the controversy; and that in the case of the Traffic Bureau of the Merchants Exchange, supra, the Commission "prescribed the actual rates to be charged between all points involved * * * *", and expressly recognized that in so doing the carriers were permitted to deviate from the provisions of the Long and Short Haul Clause of the Constitution.

Traffic Bureau of the Merchants Exchange vs. S. P. Co., et al, supra, p. 97.

It therefore conclusively appears that as to all rates here involved covering movements prior to Oct. 10, 1911, the Commission had judicially fixed their status.

LITIGATED CASES ADJUDICATED BY THE COMMISSION RELATING TO TRAFFIC MOVING PRIOR TO OCTOBER 10, 1911.

The Commission has definitely and finally decided that under the provisions of Section 21 of Article XII of the Constitution of October 10, 1911, the carriers might be permitted to deviate from the Long and Short Haul Clause of the Constitution, where the Commission had approved, and especially where it prescribed, the rates to be charged by the carriers pursuant to the provisions of Section 22 of Article XII.

In deciding the case of *Scott, Magner & Miller, et al, vs. Western Pacific Railway Co.*, 2 C. R. C., 626, supra, the Commission held:

"The framers of the constitution of 1879, however, provided in Section 22 of Article XII

that the rates should be established and published by the Railroad Commission and not by the carriers, and that the rates so established and published should be deemed in all proceedings, both civil and criminal, to be conclusively just and reasonable. It could hardly be held that a shipper could recover from a carrier for charging a conclusively just and reasonable rate—a rate, moreover, which the carrier was compelled, under heavy penalties, to charge. If the shipper were dissatisfied, he could apply to the Railroad Commission to alter the rate, but it would certainly be entirely at variance with such a system of state-made rates to hold that the Commission, in addition to making an order as to the just and reasonable rates to be thereafter charged, should also compel the carrier to pay remuneration for having charged the rate which the Railroad Commission compelled it to charge, and which, under the Constitution, became a conclusively just and reasonable rate. We are accordingly of the opinion that if the Railroad Commission had established the defendant's rates, as it was its duty under the Constitution to do, no right to reparation could have arisen, on the theory of unjust or unreasonable rates on the facts stated in this complaint prior to October 10, 1911. The shipper's remedy would be to petition the Commission to alter the rate and then to sue the carrier if he failed to conform to the rate so established. The United States Supreme Court, in the cases of *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426; and *Robinson vs. Baltimore & Ohio R. R.*

Co., 226 U. S., 506, has expressed its views with reference to the relation between the Interstate Commerce Commission and the Courts in entire harmony with the views herein expressed as to the effect which the establishment of a system of state-made rates had on the common law right to sue for damages by reason of the collection of an unjust and unreasonable rate."

In a later decision, *Scott, Magner and Miller vs. S. P. Co.*, 3 C. R. C., 339, the Commission says (p. 340):

"Reparation is requested in this case upon an alleged violation of the long and short haul clause contained in Section 21 of Article XII of the Constitution of this State prior to its amendment on October 10, 1911, and under the long and short haul provisions of the Wright Act. This commission's decision in case No. 283 (being the case last above quoted from), to which reference has already been made, gives a complete analysis of the effect of the long and short haul clause in the constitution and in the Wright Act. It was there decided that the long and short haul clause in the constitution when construed together with other provisions in the constitution announcing that the rates established by this commission should be 'deemed conclusively just and reasonable', must be regarded binding upon the carriers only until such time as the commission in any particular instance actually establishes the rates. The records of this commission show that on June 11, 1909, the commission

> established the rates to be charged by defendant for carrying hay between the points involved in this proceeding. These rates thereupon became 'conclusively just and reasonable', and the provisions of the long and short haul clause in the constitution and in the Wright Act could not be made the basis of a claim for reparation upon the charges which were collected in conformity with these rates."

This ruling is confirmed by, and amplified in, the well-considered opinion of *Pennoyer vs. S. P. Co.*, 3 C. R. C., 576.

These decisions of the Commission, as we have heretofore shown, are final and not subject to review; they are the decisions of a "Court of last resort", construing the State law; and, as we shall hereafter show, they are binding upon this Court, and should have controlled its decision.

It is respectfully submitted that the construction placed upon the constitutional and statutory provisions by this Court should therefore be modified to conform to the construction which has been placed upon the law by the Railroad Commission of the State of California.

At page 17 of its typed decision, this Court makes a distinction between the powers which may be exercised by the Railroad Commission of the State of California and the Interstate Commerce Commission. When Section 4 of the Interstate Commerce Act was amended, it is true that an express provision

was made enlarging the powers of the Commission so that temporary relief might be granted to the carriers pending the determination of their applications for relief. But it does not necessarily follow that the legislative intent to permit the Railroad Commission of the State of California to afford such temporary relief could only have been expressed by incorporating a similar provision in the State Constitution and Statute.

The case of *L. & N. R. Co. vs. Kentucky*, 183 U. S., 503, 507-8, is directly in point. This case went to the Supreme Court of the United States upon a writ of error, to review the judgment of conviction of the railroad company on an indictment for an alleged violation of a statute practically identical in terms with the Long and Short Haul Clause of the California Constitution and provisions of the Public Utilities Act. In passing upon the question as to whether the decision of the Court of Appeals of Kentucky, construing this section, controlled the decision of the Supreme Court of the United States, it was held:

> "It was contended, in the Courts below and here that as section 218 of the constitution of the State of Kentucky regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the interstate commerce act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision of the

interstate commerce law by the Federal courts, and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation or coal from points outside of the state.

Such contention might seem reasonably to have been urged in the state courts, but as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state Courts." (Italics ours)

In the decisions of the Commission which we have cited, the Commission has construed the constitutional and statutory provisions as empowering it to permit the carriers to deviate from the provisions of the Constitution by approving the specific rates which should be charged by carriers between long and short haul points, so far as the Constitution of 1879 is involved, and as empowering them to afford the carriers temporary relief pending the final determination of the issues involved in applications for relief under the amendment of 1911.

The Commission also holds that the rates effective October 10, 1911, remained in *statu quo* "until changed by the Commission."

Under the Commission's construction of the constitutional provisions, prior to the amendment of October 10, 1911, rates established by the Commission, although they might infract the provisions of Section 21 of Article XII, were lawful rates; and the Commission held that the provisions of Sections 21 and 22 should be read in *pari materia,* and that therefore there could be no violation in cases where the rates involved had been approved by the Commission. "Otherwise, the defendant would have been compelled to pay damages if it charged the rates established by the commission and also a fine up to $20,000 for each offense if it failed to charge those rates. It would be compelled to pay both if it obeyed and if it disobeyed the railroad commission's order."

The amendment to the Constitution of October 10, 1911, as was held by His Honor, Judge Ross, in his dissenting opinion, provided that the Eshelman Act of February 10, 1911, should be construed valid in all its parts by the constitutional amendment itself, and that it "shall have the same force and effect as if the same had been passed after the adoption" of the constitutional amendment, from which, His Honor Judge Ross reaches the conclusion that all action which had been taken by the Railroad Commission and all rates adopted by the com-

mission and recognized by the Commission as just rates under the Eshelman Act are recognized as valid and continued in force until changed by the Commission.

Thereby the people definitely willed that the action which had been theretofore taken by the Railroad Commission of the State of California, and the orders which had been entered by said Commission relating to rates should be continued in effect. It therefore logically follows that rates in effect on October 10, 1911, and which had been approved by the Commission, and all tariffs which had been filed with and accepted by the Commission, which required an affirmative act on the part of the Commission, were the lawful rates to be charged, and therefore could not be held to violate any provision of the amended constitution.

That these tariffs were filed with and adopted by the Commission we offered to prove herein. Leave was denied.

It is apparent from a reading of the Commission's orders, which were rendered subsequent to the adoption of the amendment of 1911, that they construed the law to mean that the rates remained and necessarily should remain in *statu quo* and pending final determination of the questions arising under the Long and Short Haul provisions of the Constitution and Statute, recognized the right of the carriers to charge the rates which were in effect upon the date of the adoption of the constitutional amendment.

The Commission therefore was vested with power to enter their temporary orders continuing the rates previously established by them in effect as lawful rates, notwithstanding that there were to be deviations from the provisions of the Long and Short Haul Clause until such time as the Commission had an opportunity of *fully* investigating the applications which had been filed by the carriers. It is apparent, from the legislative intent expressed in the Constitution and the statutory provisions of the California law, that it has been the consistent policy of the State of California from the beginning to permit deviations from the provisions of the Long and Short Haul Clause of the Constitution, as originally enacted and as finally amended, whenever in the opinion of the tribunal which has been erected to determine such questions it was believed that no undue discrimination would result therefrom.

The power of the Commission to relieve carriers from the provisions of the Constitutional inhibitions found in the Constitution of 1879 was accomplished by "establishing and publishing" the rates filed by the carriers, and when the Commission had placed its stamp of approval upon the rates, the carriers were to that extent relieved; and the rate schedules which had been "established and published" by the Commission authorized the carriers to depart from the provisions of the constitutional prohibitions by charging less for the longer than for the shorter distances.

That no departure from this public policy was intended by the enactment of the constitutional amendment of 1911, is apparent. All that was sought to be accomplished was to enlarge the powers of the Commission in the light of the restrictive rate legislation which had been enacted by the Federal and State Governments since the adoption of the original Constitution, and to provide a more comprehensive and expeditious method of determining such questions and of enforcing the law. Therefore, the people and the Legislature, in enacting the constitutional and statutory amendments to the existing law, deemed it unnecessary to expressly confer upon the Commission, as the Congress conferred upon the Interstate Commerce Commission, power to relieve the carriers temporarily from the provisions of the Long and Short Haul Clause of the Constitution, principally, as has been shown, because the Commission had accomplished that purpose in the past by "establishing and publishing" of the rates under the authority vested in them by Section 22 of Article XII, and these rates were continued in effect by the express provisions of the Constitutional amendment of 1911.

The last paragraph of amended Section 22 of Article XII provides:

> "The 'Railroad Commission Act' of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision, and any other constitutional provision becoming operative concurrently herewith, *and the said act shall have the same force*

*and effect as if the same had been passed after the adoption of this provision of the constitution and of all other provisions adopted concurrently herewith * * *"*

(Italic ours.)

The Commission's orders and decisions to which reference has been made disclose that the Commission in the exercise of the power originally conferred under Section 22 of Article XII of the Constitution of 1879, and subsequently by virtue of the power conferred by the provisions of Section 17 of the Eshleman Act, adopted February 19, 1911, had actually established rates to be charged by the carriers between all points involved in this proceeding.

That this power is sufficiently broad to enable the Commission to have entered these orders is shown by the express provisions of Section 17 of the Eshleman Act.

> "It is hereby made the duty of the commission within a reasonable time not exceeding sixty days after the filing of the schedules or tariffs and classifications and proposed changes therein of any such railroad or other transportation company to establish such of the rates and classifications included therein, as it may approve and as to those not so established to proceed with the establishment of others in lieu thereof after notice and opportunity for hearing given such company as provided in section sixteen of this act; *provided, however*, that until the establishment of such rates and classifications or

> the establishment of other in lieu thereof the said railroad or other transportation company filing such schedules or tariffs and classifications, and parties thereto, shall charge and collect the rates and fares in effect at the time of the passage of this act, and that with said exception no railroad or other transportation company subject to the provisions of this act shall engage or participate in the transportation of freight or passengers except at rates of charges and classifications which have been established for it by the commission."

The conclusion is irresistible that it was intended that the Commission could and should exert this power of granting relief, so as not to compel a situation which would result in a temporary adjustment, disarranging all previous adjustments, and bringing about commercial chaos.

THE DECISIONS OF THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA ARE THE DECISIONS OF A COURT OF LAST RESORT AND ARE BINDING UPON THE FEDERAL COURTS.

We have already shown that the Railroad Commission of the State of California has been constituted a "court," and that its "decisions upon * * * * controverted matters are strictly judicial".

Pacific Telepone & Telegraph Co. v. Eshleman, Supra.

It has been held that the construction by the highest court of a state of a state statute, defining the powers of the state Railroad Commission, is binding upon the Federal Courts in determining the powers of the Commission.

Louisville & Nashville RR Co. v. Kentucky Railroad Commission, 214 *Fed.* 465.

The decisions of the courts, Federal and State, are practically unanimous in holding that the decisions of such a tribunal construing the constitutions and statutory laws of a state are binding upon the Federal Courts.

The latest announcement of this rule by the Supreme Court is found in the case of *Northern Pacific Railway v. Meese*, 239 U. S. 614, 619.

As early as the case of *Carroll v. Safford*, 3 *Howard*, 441-460, the Supreme Court held:

> "The practical construction of local laws is perhaps the best evidence of the intention of the law makers. The courts of the United States adopt as a rule of decision the established construction of local laws, and it cannot be material whether such construction has been established by long usage or a judicial decision."
>
> *Gilman v. City of Sheboyan*, 2 *Black*, 518.

It has also been held that a decision by the highest court of a state, placing a limitation upon the scope of a state statute, whether based upon a construction of its language *or considerations of public policy*, is in either case an interpretation of the

statute which must be followed by the Federal Court.

Zeigler v. Pennsylvania R. Co., 158 Fed. 809.

Where the highest court of a state, in this case the Supreme Court of the State of California, has decided that the decision of another court of the State, in this instance the Railroad Commission of the State of California, is final, the Supreme Court of the United States has held that a writ of error will lie direct to the Supreme Court of the United States from the court in which the decision is made final.

Missouri, Kansas & Texas Railway Co. v. Elliott, 184 *U. S.* 530.

The Supreme Court of the United States has gone so far as to hold that—

> "Even if no statute or decision of the Supreme Court of the State is produced, the probability is that the local procedure follows the traditions of the place, and courts of other jurisdictions owe great deference to what the court concerned with the case has done."

It is held in this case—

> "It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws.
>
> *Michigan Trust Company vs. Ferry*, 228 *U. S.* 346, 354.

The local option statutes of the State of Texas being enforced through criminal proceedings, in de-

termining the validity and construction of such statutes the court of criminal appeals of the state of Texas is the court of last resort, the Federal Courts are bound to follow the construction placed upon such statutes by that court.

Love vs. Busch. 142 *Fed.* 432.

The authorities are uniform in holding that a single adjudication by the court of last resort of a state is *binding* upon the Federal Courts, and that it does not require a series of such adjudications by the court of last resort to bind the Federal Courts.

Adams Express Company v. Ohio, 165 *U. S.* 219;

Kibbe vs. Ditto, et al., 93 *U. S.* 674-680.

Williams vs. Eggleston, 170 *U. S.* 311;

Louisville, etc. Ry. Co. v. Mississippi, 133 *U. S.* 589-90.

This well established rule has been applied to subordinate tribunals empowered to exercise quasi judicial power. The decisions of a board constituted to try election contests, which it had the power to decide, its decisions being considered a judgment in litigated matters pending before it, was held to be a court by whatever name it was called.

Moss etc. v. Rowlett, etc. 112 *Ky.* 123.

Federal Courts are bound by the decisions of a commission appointed to relieve the business of the Supreme Court of a state when there has been no adverse decision rendered by the Supreme Court.

It was held by the Circuit Court of Appeals of the Second Circuit that

> "The Commission of Appeals was a temporary court of last resort created to assist the Court of Appeals in disposing of an overcrowded calendar"

and that while there were two co-ordinate courts of last resort sitting in the same state at the same time and deciding questions of the construction of state statutes in diametrically opposite ways, the Federal Court might

> "with greater propriety confirm its decision to that of the permanent, rather than to that of the temporary, state court, unless some later decision should be found, casting doubt upon the authority of the permanent court."
>
> *Montgomery v. McDermott*, 103 *Fed.* 801, 809.

There is no conflict in the decisions of the courts in this state relating to the questions under consideration; and this case is cited merely to emphasize the fact that subordinate judicial tribunals, the decisions of which are final, may render decisions controlling upon Federal Courts, even though their decisions may be opposite to the decision of a permanent court of last resort.

It has been decided by the Supreme Court of the United States that where a commission was appointed under a constitutional amendment to dispose of such part of the business on the docket of the Supreme Court as should by arrangement between the commission and court be transferred to the commission, that

> "A decision of the commission upon a question properly presented to it in a judicial proceeding is, therefore, entitled to the like consideration and weight as a decision upon the same question by the court itself, and is equally authoritative.'
>
> *Ankeny v. Hannon*, 147 *U. S.* 118-126.

The Railroad Commission of the State of California is a "court", empowered to exercise functions which are "highly judicial" and it is charged with the administration of the law relating to the regulation of public utilities. It has been constituted an expert tribunal to determine controversies arising under this law and its decisions should be given controlling weight, even though a different construction had been placed upon the law by any other tribunal which might have jurisdiction of any such controversies. No other construction has, however, ever been placed upon the California Constitution or statutes by any other "court" of this State, and the power to determine these questions has been vested exclusively in the commission.

If any possible doubt exists as to the meaning of the constitution or the statute, great weight should be given to the construction placed upon it by the department charged with its execution, and the decisions of such department, as was said by the Supreme Court of the *United States, I. C. C. vs. Illinois Central Railroad Company*, 215 *U. S.* 452, should have

"Ascribed to them the consideration due to the judgments of a tribunal appointed by law and informed by experience."

"When the meaning of a statute is doubtful, a *practical construction by those for whom the the law was enacted,* or by public officers whose duty it was to enforce it, acquiesced in by all for a long period of time, in the language of Mr. Justice Nelson, 'is entitled to great if not controlling influence.' (Chicago v. Sheldon, 9 Wall 50, 54.) In People ex rel. Williams v. Dayton, (55 N. Y. 367) the practical construction of a doubtful statute by the legislative and executive departments, continued for many years, was held to have 'controlling weight in its interpretation.' "

City of New York v. New York City Ry. Co., 193 *N. Y.* 549.

"The construction given to a statute by the officers appointed to execute it and acted upon by them for a long term of years, though not conclusive, is entitled to great consideration, by the Court. Union Ins. Co. vs. Hoge, 21 How. 35-66; Edwards, Lessee vs. Darby, 12 Wheaton 210."

Gear vs. Grosvenor, 10 *Federal Cases No.* 5291.

"It is a familiar doctrine that the *construction given to a statute by officials charged with its administration will be upheld* by the courts unless convincing reason to the contrary is found in the language or purpose of the enactment. *New Haven R. R. Co. v. Interstate*

Commerce Commission, 200 *U. S.* 361, 401, 26 *Sup. Ct.* 272, 50 *L. Ed.* 515."

Illinois Surety Co. vs. United States, 215 *Fed.* 338.

"A construction of the law by the *officers charged with its administration* and acquiesced in by all of the departments of the government for a long period should be accepted by the courts, citing 98 *U. S.* 334, 180 *U. S.* 139."

Taggart vs. Great Northern Ry. Co., 208 *Fed.* 460.

United States vs. Cerecedo Hermanos Y. Compania, 209 *U. S.* 337, 339;

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State of Louisiana v. Garfield, etc., 211 U. S. 70;

United States v. Bellm, 182 *Fed.* 161;

United States v. S. Twitchell Co., 184 *Fed.* 252.

It is respectfully submitted that this court in rendering its decision should under these authorities have followed the construction placed upon the Constitution and the statutory law of the State by the Railroad Commission of the State of California, especially as this Commission is not only a body of experts charged with the administration, construction and enforcement of the state law, but also because a majority of the Commissioners being law-

yers of recognized ability, are therefore well qualified by experience and professional education to construe the law. This court should have adopted the Commission's construction because the authorities hold that the findings of fact and decisions of the Commission are final and are binding upon the Federal Courts.

In the case of *Matz et al v. Chicago & A. R. Co.* 85 *Fed.* 180, the Federal Court in determining whether a statute applied to certain cases, found that the question had never been raised by the judges or counsel engaged in deciding and prosecuting such suits.

Held, that

> "Uniform and contemporaneous action and opinion of the bench and bar of a state should have weight with the Federal Courts in construing a statute of the state."
>
> "The practical construction given to a law by the practice of the court and bar since the enactment of the law, and the form adopted for the enforcement of the penalties provided by that law, are not to be overturned but on the clearest proof that that construction is erroneous and the method of procedure defective."
>
> *United States v. Ballard*, 24 *Federal Cases No.* 14506.

The Supreme Court of the United States has held that custom or usage may be looked to in order to determine the proper determination of a statute.

> *Berbecker v. Robertson*, 152 *U. S.* 373, 376.

Never since the adoption of the Constitution in 1879 until the cases recently decided by the California Railroad Commission have the questions involved in this suit been raised, but the bench and the bar, carriers and shippers alike, have regarded the law as settled as compelling carriers to charge rates adopted, approved and prescribed by the Commission, under the powers vested in it by the Constitution, irrespective of the question whether under such rates so established the carriers charged more for the shorter than for the longer haul, over the same line, in the same direction, and the Commission has consistently held that the carriers have been relieved by its orders approving and establishing rates in deviating from the provisions of the Constitution as originally enacted and as finally amended.

A review of the Public Utilities Act of the State of California, read in conjunction with the comprehensive constitutional amendments which were contemporaneously adopted, discloses a well expressed legislative intent to provide a comprehensive system of regulating railroads, vesting "powers of a highly judicial nature" in a body of experts, and constituting the Commission a "court", with a jurisdiction intended to extend throughout the State, and vesting the Commission with the greatest possible power and jurisdiction to supervise and regulate railroads operating within the State, and confiding to the Commission such powers as are necessary and convenient to regulate such railroads

and determine controverted questions such are raised in this proceeding.

The statute is remedial and should receive a liberal construction, in order that its broad purpose may be effectuated. The State of California, while following the lead of the Federal and other state governments, has nevertheless, in its desire to provide for an ample and thoroughly effective scheme of regulation gone further than its predecessors and by constitutional enactment has authorized the legislature to—

> "confer upon the Commission such powers as it may see fit, even to the destruction of the safe-guards, privileges and immunities guaranteed by the Constitution to all other kinds of property and its owners,"

and in the *Pacific Telephone & Telegraph Company* case it was held that this was

> "perhaps the first instance where the Constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions * * * * "
>
> "It may be said that the final order of the Commission in many instances is legislative and administrative in character, but none the less the ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial."

The Constitution has not only created a Railroad Commission and, under the amendment of 1911 greatly enlarged its power, but has vested the legis-

lature with plenary power, unlimited by any provision of the state Constitution, other than those authorizing the creation of the commission and defining its powers to confer additional power upon the Commission. The Supreme Court of the state has held that to this extent the Legislature has been given the powers of Parliament and is only restricted by the Federal Constitution; and that the power of review, reserved or vested in the Supreme Court of the State, under the construction placed upon the Constitution and statutes by the Court itself, is extremely limited.

The Railroad Commission of the State of California has determined in other formal and controverted proceedings the questions which are involved in the case at bar, and has as a court of last resort, held that the applications made by Southern Pacific Company and the order entered thereon, after investigation by the Commission, have given plaintiff in error a dispensation from the provisions of the long and short haul clause, and under no circumstances can there be a review from the *findings of fact* made by the Commission.

In view of the decision of the Supreme Court of the State of California in the Pacific Telephone & Telegraph Case, holding that the decisions of the Commission cannot be reviewed except upon jurisdictional questions, it must be held that the *findings of fact* and orders made and entered by the Commission are necessarily final upon the construction of the provisions of the Constitution and of the law

passed pursuant thereto, and as there were no jurisdictional questions involved in the proceedings before the Commission which might be reviewed by the Supreme Court of the State, the Commission's decision is that of the highest tribunal in construing the constitutional and statutory law of the State.

The decisions of the Supreme Court of the United States, to which we have referred, render it certain that the decisions of the Commission, as a court of last resort, are binding upon the Federal Courts. The reasons why such a rule applies and governs in the present case are apparent when consideration is given to the fact that there are now pending in the State Courts many suits involving claims of a character similar to that involved in the case at bar, in which suits the State Courts are bound under the decisions of the Supreme Court of the State of California to regard the decisions of the Railroad Commission of the State as final and controlling, and the state courts must therefore necessarily hold therein that there is no right of recovery against the carriers for the reason that the carriers have complied with the law and secured a dispensation from the provisions of the long and short haul clause by an order of the Commission. Yet, merely because a suit happens to be filed in a Federal Court, we have at the present time a rule in force holding that the carriers are liable. The result is that there are two forums enforcing absolutely conflicting decisions, which is precisely the

result which the Supreme Court of the United States intended should never occur.

The plaintiffs in the court below, by invoking the jurisdiction of this court, solely upon the ground of diversity of citizenship, have indirectly sought to accomplish what they could not do directly—to have this court review the orders of the Railroad Commission of the State of California and the judgment entered by the trial court, and the confirmation of that judgment by this court has been to reverse the Commission's decisions not only on questions of law but on *findings of fact.*

It is perhaps due to the court to say that we regret that these questions were not fully presented to the court in the briefs and argument.

The confidence of counsel that this court, in deciding the case, would follow the Commission's construction of the state constitution and laws, undoubtedly led him away from an exposition of the points and authorities now presented; but it is respectfully submitted that the importance of this controlling question justifies the court in giving full consideration to the points and authorities now presented, and that a rehearing of this case be granted.

Respectfully submitted,

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WM. F. HERRIN,
Of Counsel.

We hereby certify that in our judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

HENLEY C. BOOTH,
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FRANK B. AUSTIN,
Attorneys for Plaintiff in Error.

WM. F. HERRIN,
Of Counsel.

No. 2643.

3

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,

Defendant in Error.

ANSWER TO PETITION FOR REHEARING

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Filed this.....day of December, 1916.

FRANK D. MONCKTON, *Clerk.*

By.....

Deputy Clerk.

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ANSWER TO PETITION FOR REHEARING

In its petition for a rehearing plaintiff in error merely elaborates some of the arguments made in its briefs.

In the petition for rehearing there are three contentions made. The first is that the opinions of the Commission construing the Constitution and its own orders are binding upon the courts. The second contention is that the Commission is the "court of last resort" of California, and that its decisions on matters of law are binding on the Federal Courts. The

third contention is that the courts should adopt the construction said to have been placed by the Commission upon the Constitution as it existed prior to October 10, 1911. In support of this contention authorities are cited to the effect that where a statutory provision is ambiguous, and a body charged with the administration of the statute has construed such ambiguous provision, and such construction has been acquiesced by all departments of the government for a long period of time such construction should be adopted by the courts.

We will reply to their contentions under the following heads:

1. Reply to contention that the opinions of the Commission construing the Constitution and construing its own orders are binding on the courts.

2. Reply to contention that the Commission is the "court of last resort" of California and that its opinions are binding upon the Federal Courts.

3. Reply to contention that the courts should adopt the construction said to have been placed by the Commission upon the Constitution as it existed prior to October 10, 1911, in support of which contention plaintiff in error cites authorities holding that where a statutory provision is ambiguous, and the body charged with its administration has construed such ambiguous provision, and its construction has been acquiesced in for a long period of time, such construction should be adopted by the courts.

1. REPLY TO CONTENTION THAT THE OPINIONS OF THE COMMISSION CONSTRUING THE CONSTITUTION AND ITS OWN ORDERS ARE BINDING ON THE COURTS.

This contention is based upon the decision of the Supreme Court in *Pacific Tel & Tel. Co.* v. *Eshleman,* 166 Cal. 644, 650. Because, as held by the Supreme Court in the case, the findings of fact of the Commission are final and not subject to review, it is contended that the opinions of the Commission on questions of law are equally binding.

As pointed out at page 82 of Defendant in Error's brief on the re-argument all that the Supreme Court held in *Pacific Tel., etc., Co.* v. *Eshleman, supra,* was that "the powers and functions of the Railroad Commission in many instances, and in the present one, are of a highly judicial nature." The power under consideration by the Supreme Court related to compelling physical connection between the lines of competing telephone companies. The question as to whether or not the powers exercised by the Commission were judicial was necessarily before the Court because the application in the *Telephone* case was for a writ of *certiorari*, which will be issued only to a body exercising judicial functions. In holding that the powers were of a judicial nature and that the writ should issue, the Supreme Court cited as authority the case of *Imperial Water Co.* v. *Board of Supervisors,* 162 Cal. 114, wherein the court had held that a board of supervisors in taking the steps required by statute for the organization of an irrigation district exercises judicial functions.

In its petition for a rehearing the plaintiff in error does not attempt to question the correctness of the views of this court in relation to the *Telephone* case.

In the petition for a rehearing the statement is made that "The Railroad Commission of the State of California has been constituted a 'court of last resort,' and its decisions in cases such as this are final and not reviewable."

Now the matter here involved is very simple. When the Constitution was amended on October 10, 1911, the Commission was empowered to hear applications of the carriers for relief from the long and short haul prohibition, and, if after investigation, it reached the conclusion that relief should be granted, the Commission was authorized to prescribe the extent to which the carrier might be relieved from the prohibition. The constitutional provision reads as follows:

> "It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission, provided for in this Constitution, such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent

> to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

If after investigation the Commission had made an order granting relief its order would not be reviewable in the courts. But the Commission has made no order granting relief, and no order of the Commission granting relief is under "review" in this case. The shippers represented by the defendant in error are insisting that the carrier refund charges collected in violation of the Constitution. The plaintiff in error, in its answer, pleaded that the Commission, after investigation, had granted permission to charge the rates which the plaintiff in error collected. This defense wholly failed, for no such order of the Commission was proved.

The contention of plaintiff in error amounts merely to this: That the *opinion* of the Railroad Commission as to the effect of its orders made subsequent to October 10, 1911, is binding on the courts. Counsel say that the Railroad Commission of California is the "court of last resort" where questions of the construction of the constitutional provisions relating to public utilities are involved or where the orders of the Commission itself are involved.

This contention was made at the last oral argument and was replied to at page 81 of defendant in error's brief on re-argument.

As stated in our brief, the Supreme Court of California and the District Courts of Appeal are ordained by the Constitution for the purpose of authoritatively

construing the laws of California. The power to construe the laws was not vested in the Railroad Commission. *Necessarily any body exercising judicial functions is required to construe the law for the purpose of the inquiry then being conducted; but its construction of the law is not authoritative.* The power of the Railroad Commission is not different in this respect than the power of a board of supervisors when it takes the various steps required by statute for the purpose of organizing an irrigation district.

The decision of the Supreme Court in the *Telephone* case (166 Cal. 640, 650), *supra,* to the effect that in compelling physical connection between the lines of competing telephone companies the functions of the Railroad Commission were of a judicial nature was based upon the authority of the case of *Imperial Water Company* v. *Board of Supervisors, supra,* where it was held that in taking the steps to organize an irrigation district a board of supervisors exercises judicial functions.

Although the opinion in the *Telephone* case is lengthy, the matters decided were few and simple. Before the Court could consider the application for writ of *certiorari,* it was called upon to say that in compelling physical connection between the lines of two telephone companies the Railroad Commission exercised judicial functions. This was necessary because the writ will only issue to a body exercising such functions. Further the court held that the compelling of one telephone company to furnish the use of its lines to a competing company constituted a taking of private property for a public use, and this could not be done without compensating the company whose

property was taken. As the order sought to be reviewed did not make any provision for compensation the Supreme Court held that it violated the Fourteenth Amendment to the Federal Constitution and that it also violated the Fifth Amendment, which provides that private property shall not be taken for public use without just compensation. The Supreme Court also held that there was nothing in the Public Utilities Act under the authority of which the Commission proceeded which evidenced an intention that the compensation should not be made *before* the property was taken, as required by Section 14 of Article I of the Constitution of California. Because it violated these provisions of the Federal and State constitutions the order was annulled. With reference to the violation of the State Constitution the Supreme Court held that the legislature, in legislating on the subject of public utilities, had the power to ignore all provisions of the State Constitution except the provisions thereof relating to public utilities.

The contention of plaintiff in error is that where a body is vested with judicial powers and the law provides that a determination of a question of fact by such a body is final and not subject to review, that the body becomes thereby a "court of last resort" in construing the statute vesting it with such powers; and in determining the legal effect of the orders which it may make in the exercise of such powers.

Of all the contentions made by plaintiff in error in this case, this is, we respectfully submit, the most unsubstantial. And yet it is made the foundation for a petition for a rehearing, presumably for the reason that the Court did not specifically refer to it in its

opinion rendered herein. We presume the fact to be that this contention, as well as some other contentions of plaintiff in error, were so patently groundless that this court did not deem it necessary to answer them.

All that the Supreme Court held in the *Telephone* case, or in any other case, is that the findings of the Commission on questions of fact are not subject to review, provided the findings are within the jurisdiction of the Commission. Counsel for plaintiff in error should realize this, for at the same time they make the contention that the Commission is a "court of last resort," they quote and italicize (Petition for Rehearing, page 9), the following language from the decision of the Supreme Court in *Oro Electric Corporation* v. *R. R. Commission,* 169 Cal. 466, 471:

> "The findings and conclusion of the Commission on questions of fact are made final and not subject to review."

With reference to the causes of action which accrued subsequent to October 10, 1911, counsel state:

> "The Commission has definitely and finally decided:
>
> (c) That the Railroad Commission of the State of California has authorized the carriers to deviate from the long and short haul clause."

The petition for a rehearing then goes on to mention the order of October 26, 1911, the order of November 20, 1911, the "hearing" of January 2, 1912, and the order of January 16, 1912.

Referring to the contention that the Commission

had authorized the charges made by plaintiff in error, this Court in its opinion herein said:

> "The orders of November 20, 1911, and January 16, 1912, made by the Commission went no further than to give permission to railroads to file with the Commission for establishment such changes in rates and fares as would occur in the ordinary course of their business, 'continuing under the present rate bases or adjustments higher rates or fares at intermediate points, provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911,' etc., but expressly declaring 'that the commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission, or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2, 1912.' But it does not appear that the defendant filed such an application until December 30, 1911, or that an investigation was ever had by the Commission, or that it ever made an order finally approving any of said rates or fares. If, indeed, the orders of the Commission may be construed as expressly giving by their terms authority to continue in effect until an investigation, the rates then in existence which deviated from the Constitutional provision as to the long and short haul, it is obvious that the Commission erroneously assumed that the act of 1911 gave it the power to make such an order. The amendment of 1911 gives the power to authorize a deviation from the prohibition of the Constitution only upon the application of the carrier, and after an investigation by the Commission, for it does not, as does the Act of Congress giving authority to the Interstate Commerce Commission, authorize the fixing of temporary rates pending investigation. Assuming that under

> such a temporary order the defendant continued to make charges forbidden by the Constitution, it would be necessary for it to show, in defending an action for the recovery of such charges, that the Commission finally approved the rates, and made them valid by an order made after an application and investigation as required by the statute."

The contention that the Commission "has authorized the carriers to deviate from the long and short haul clause" is not based upon the orders which were admitted in evidence, *but upon what counsel state the Commission has said with reference to those orders in other cases pending before that body.* Counsel state, "The Commission has definitely and finally construed these orders and determined the scope and effect of proceedings thereunder."

This brings us back to the contention made in the briefs of plaintiff in error and again in this petition for a rehearing that the Commission is a "court of last resort" in construing the Constitution and its own orders.

As we have seen, the findings of the Commission on questions of fact are not subject to review in the courts. That is as far as the Commission is constituted a "court of last resort." But the Commission is not constituted the "court of last resort" in the matter of the construction of the Constitution of the State or in the matter of determining the legal effect of its own orders. The Supreme Court of the State and the District Courts of Appeal are the tribunals upon whom the Constitution has conferred power to authoritatively construe the laws of the State.

But as pointed out in the briefs of defendant in

error the Commission has never in any of its opinions said that it granted the applications of the carriers for relief from the prohibition of the Constitution.

In *Scott, Magner & Miller* v. *Western Pacific Railway Company,* 2 C. R. C. 626, 635, cited by plaintiff in error, the Commission said:

> "Acting under the authority granted by Section 21 of Article XII of the Constitution as amended, the Commission heretofore, on February 15, 1912, issued its order in Case No. 214, authorizing the carriers of the State to continue their deviations from the long and short haul clause *until the Commission could determine definitely the instance, if any, in which it will permit deviations to continue to be made.* While the Commission's order authorizing the temporary continuance of the deviations remains in effect, no cause of action can arise from alleged violations of the long and short haul provisions of the Constitution."

The order of February 15, 1912, referred to by the Commission, was not introduced in evidence at the trial of this case. Presumably it was to the same effect as the order of January 16, 1912, as the Commission says it "authorized the carriers of the State to continue their deviations from the long and short haul clause *until the Commission could determine definitely the instances, if any, in which it will permit deviations to continue to be made.*" The expression of opinion of the Commission to the effect that while the order "authorizing the temporary continuance of the deviations remained in effect, no cause of action can arise from alleged violations of the long and short haul provision of the Constitution" is merely the statement of an erroneous conclusion of law.

The next case cited in the petition for rehearing is *Phoenix Milling Co.* v. *Southern Pacific Co.* v. *Southern Pacific Company,* 7 C. R. C. 677, 682. In that case, as appears from the quotation from the opinion in the petition for a rehearing, the Commission said:

> "By this order (the order of October 26, 1911), the carriers were impliedly granted permission, for practical reasons, to maintain the *status quo* until the Commission passed upon such applications. By a subsequent order issued on November 20, 1912, in the same proceeding, express permission so to do was given."

There is no statement in this opinion to the effect that the Commission supposed it had granted relief after investigation, but merely a statement that the Commission "granted permission to the carriers for practical reasons to maintain the status quo *until the Commission passed* upon such application." But the Commission had no power to "maintain the status quo" pending investigation. The rates could be legalized only after investigation.

So in the next case cited, viz., *Fresno Traffic Assn.* v. *Southern Pacific Co.,* 8 C. R. C. 390, the Commission with reference to an order of February 15, 1912 (which order was not introduced in evidence by the plaintiff in error), said:

> "On February 15, 1912, the Commission issued an order authorizing the carriers to continue deviations from the long and short haul clause, *until the petitions had been finally passed upon by the Commission.*"

In the last mentioned case the Commission said that "previous to the order of February 15, 1912, an extended investigation was made by the Rate De-

partment of the Commission * * * with reference to the deviations from the long and short haul clause."

Counsel refer to this statement made by the Commission long after the judgment in the case at bar was rendered and in a reparation case between private parties as "the significant and conclusive finding" that an investigation was made.

It was incumbent upon the plaintiff in error to sustain its special defense that the Commission investigated its applications and granted relief. *No evidence was offered tending to show that there was any investigation, nor was any order granting authority to charge more for the shorter distance offered in evidence.*

Instead of relying upon the evidence in the record, the plaintiff in error cites an opinion of the Commission rendered a year and a half after the judgment herein was rendered, which opinion states that some sort of an investigation was made by the Commission before an order dated February 15, 1912 (not offered in evidence by plaintiff in error) was made by the Commission. Furthermore, the opinion of the Commission shows that the order of February 15, 1912, was made by the Commission on the erroneous assumption that it had power to maintain the so-called *status quo* of the rates pending investigation. According to the Commission's opinion the order of February 15, 1912, did not purport to grant, in whole or in part, any of the applications of the carriers, but was merely a blanket order attempting to legalize all rates violative of the constitutional prohibition until the Commission had passed upon the applications of the carriers.

Counsel for plaintiff in error also cite an opinion of the Commission rendered on June 19, 1916, in *Matter of the Application of Southern Pacific Company, etc., for relief* (Case No. 214), in which opinion it is stated that the order of February 15, 1912, was preceded by a "number of hearings." Referring to the order of February 15, 1912, the Commission says that it "authorized the carriers to continue in effect rates in violation of the Constitution until such time as the Commission reached a final conclusion in each individual case."

Parenthetically it may be noted that the Commission is evidently in error when it says that a number of hearings were held prior to February 15, 1912. The record in this case shows that only one hearing, that of January 2, 1912, was held. No evidence of any kind was introduced at this hearing, and it adjourned without day. A certified copy of the minutes of the meeting held in Case No. 214 on January 2, 1912, was introduced in evidence (Record pg. 423), with reference to this hearing counsel for plaintiff in error made the following admission:

> "There was a discussion held, but no evidence introduced, nothing further done; it was postponed without day." (Record, pg. 423.)

After referring to the opinion of the Commission rendered on the 19th of last June, counsel refer to the order made in pursuance of that opinion granting certain of the applications of the Southern Pacific Company for relief from the prohibition of the Constitution. This order may be a valid defense in an action to recover for overcharges on shipments moving subsequent to June 19, 1916, but we are not con-

cerned with it in this case. It is instructive, however, as showing just which kind of an order the Commission makes when it *grants* an application for relief.

The order reads:

> "It is Hereby Ordered that the Southern Pacific Company and its connections be and they are hereby authorized to continue commodity notes as set forth in the applications and exhibits referred to in said opinion and maintain higher rates at intermediate points."

Probably many of the applications of the plaintiff in error were granted by orders of the Commission made subsequent to January 16, 1912 (the date of the order offered in evidence in this case), and prior even to June 19, 1916, but these orders could have no bearing on this case.

In concluding its argument that after October 10, 1911, the Commission granted the plaintiff in error permission to make the charges complained of in this action, plaintiff in error, at page 17 of its Petition for Rehearing, states:

> "The trial court overruled plaintiff's demurrer to defendant's special defense Number Seven, pleaded in the answer, and recognized that if the allegations were supported by eveidence that the defendant was entitled to judgment. The record disclosed conclusively that the Commission, after investigation, and after petitions had been filed by defendant, authorized defendant to charge more for the shorter distance to the intermediate points between San Francisco and Los Angeles than for the longer distance in the same direction, and as this evidence was not controverted, defendant was entitled to a judgment."

In reply to the foregoing we can do no better than to refer the Court to the part of its opinion last quoted, *supra.* No attempt is made in the Petition for Rehearing to show that the statement of the law there made is in any respect erroneous.

We cannot believe that counsel for plaintiff in error were or are in earnest in contending that the opinions of the Commission are in any sense binding on the courts. At page 18 of the Petition for Rehearing the following statement is made:

> "The Commission has repeatedly and consistently held in the decisions to which we have referred that applications sufficient in form and substance were filed, and that, after investigation, it authorized the deviation from the long and short haul provisions of the Constitution, and that being a finding of fact, is not open to review in this action."

Whether or not the Commission "authorized the deviations" is to be determined by the courts from the orders the Commission made in the premises, and not by the opinion of the Commission as to the legal effect of its orders. *A "decision" of the Commission as to the legal effect of one of its prior orders is not a "finding of fact" which is made final by section* 67 *of the Public Utilities Act, which provides that "The findings and conclusions of the Commission on questions of fact shall be final and not subject to review."*

With reference to the causes of action which accrued prior to October 10, 1911, the date the Constitution was amended, plaintiff in error states:

> "The Railroad Commission of the State of

> California has rendered decisions which are final and from which no appeal can be prosecuted, deciding that there can be no recovery under the provisions of Section 21 of Article XII of the Constitution of 1879, on shipments moving under rates which had been 'established and published' by the Commission under the provisions of Section 22 of the same article and the record in the case at bar shows that the Commission has approved the tariffs relating to the traffic involved in this controversy."

In its opinion herein this Court said:

> "As to the first group of claims, that is, those on charges collected prior to October 10, 1911, it was claimed by the plaintiff, and held by the Court below, that the Commission was powerless to charge rates in contravention of the prohibition of the Constitution, and that if the Commission assumed to fix such rates, the act was void, and cast no obligation upon the carrier to obey its order, and afforded no protection for its act."

This Court held that the District Court committed no error.

No attempt is made in the petition for rehearing to show that the holding of the District Court is erroneous or that the decision of this Court is erroneous. But it is contended that in construing the Constitution this Court was bound to adopt the construction which counsel say the Commission has placed upon it in its opinion rendered in the case of *Scott, Magner & Miller* v. *Western Pacific Ry. Co.*, 2 C. R. C. 626. Counsel say: "These decisions of the Commission, as we have heretofore shown, are final and not subject to review; they are the decisions of a 'court of last resort' construing the State law.

In the first place the expression of opinion in *Scott, Magner & Miller* v. *Western Pacific Railway,* 2 C. R. C. 626 (decided April 15, 1913), to the effect that the Commission had power to establish rates which violated the long and short haul prohibition of the Constitution as it existed prior to its amendment on October 10, 1911, was merely a *dictum.* It was held that the rates complained of by the complainant in that case did not violate the terms of the long and short haul clause of the Constitution, as it existed, prior to the amendment, and it was further held that the rates complained of had never been "established" by the Commission. This matter is fully discussed at pages 133 to 138 of the first brief filed by defendant in error.

In the case of *Scott, Magner & Miller* v. *S. P. Co.,* 3 C. R. C. 339 (decided August 2, 1913), the statement of the Commission that prior to October 10, 1911, it could lawfully establish rates which violated the long and short haul prohibition of the Constitution was also a *dictum.* The matter was not involved in that case, as the Commission conceded that the rates charged did not violate the terms of the Constitutional prohibition. Like the shipments involved in the first *Scott, Magner & Miler* case, the shipments in the second case moved from points west of Tracy to San Francisco and Oakland. The lower charge upon which the complainant based its claim to reparation was the charge from Tracy to San Francisco and Oakland. In holding that the long and short clause of the Constitution was not violated, the Commission, after quoting the Constitutional provision, said:

> "It will be noted that this provision includes only such cases as involve a lower rate *'to a more distant station, port or landing.'* It is not suffi-

cient that the case involves a lower rate *'from a more distant station, port or landing.'* Complainants rely in this proceeding on the fact that the rate from points intermediate between Tracy and San Francisco is less than the rate from Tracy to San Francisco, i. e., less than the rate *'from a more distant station, port or landing.'"*

The Commission further said:

> *"If the rates collected by the defendant company upon the shipments involved in this proceeding moving between June* 2, 1911, *and October* 10, 1911, *are in violation of any of the provisions of the Constitution or statutes of this State, the complainants are entitled to reparation."*

In the case of *Penoyar* v. *S. P. Co.,* 3 C. R. C. 576 (decided Sept. 19, 1913) the Commission merely held that a shipper who, prior to October 10, 1911, paid the rates established by the Commission was not entitled to show that such rates were discriminatory. The case did not involve the long and short haul clause of the Constitution.

Counsel refer to the order made by the Commission on March 28, 1912, which was offered in evidence at the trial (Tr. pg. 428). This order is referred to under the title "Causes of Action arising prior to October 10, 1911." In this order the Commission prescribed the actual rates to be charged to the various points.

This order was objected to upon the ground that it was not effective until all the shipments described in the complaint had moved (Tr. pg. 427). When this objection was made counsel for plaintiff in error said:

"Inasmuch as counsel objects upon the ground that it did not become finally effective until May 27, 1912, and the objection is well taken and that is correct, I will stipulate to that, for the purpose of saving putting in or offering the extension order." (Tr. pg. 427.)

2. REPLY TO CONTENTION THAT THE COMMISSION IS THE "COURT OF LAST RESORT" OF CALIFORNIA AND THAT ITS OPINIONS ARE BINDING UPON THE FEDERAL COURTS.

Much of what is said under the preceding head is also in answer to this contention.

In the last subdivision of the petition for a rehearing the contention is made that the decisions of the Railroad Commission are the decisions of a "court of last resort" and are "binding upon the Federal Courts."

Counsel say that in the *Telephone* case the Supreme Court held that the Commission was a "court." All that the Supreme Court held in that case was that the Commission was a body exercising judicial functions. In one part of its opinion the Court said that in the Railroad Commission the Constitution had created "both a court and an administrative tribunal." This statement has the same meaning as the statement that the Constitution created an administrative tribunal and a tribunal empowered to exercise certain judicial functions. That the Commission is not a court in the ordinary meaning of the term was plainly recognized by the Supreme Court. At page 657 the court refers to the clearly expressed attempt of the Legislature in the Public Utilities Act "to deprive all the courts of the State of the power to say whether a specific order of the Commission is reasonable or discriminatory." At page 687 the Court said:

> "In the case of public utilities the power of eminent domain shall be exercised and damages assessed by the railroad commission, while the owners of all other kinds of property shall have the assessment made in court by a jury."

But, as we have seen, all that the Supreme Court held in the *Telephone* case is that under Section 67 of the Public Utilities Act the findings of fact made by the Commission are not subject to review in the courts.

In support of this contention counsel cite the case of *Missouri, Kansas & Pacific Ry. Co.* v. *Elliott,* 184 U. S. 530. In that case the Supreme Court merely held that where the decision of a court of the state is made final by statute, a writ of error will lie direct to the Supreme Court of the United States from the court in which the decision is final. This has been held time and time again by the Supreme Court. Many of the decisions of that court were rendered on writs of error to county courts whose decisions on appeal from courts of justices of the peace were made final by statute. But the Supreme Court in such a case is not bound by the construction of the state law adopted by the county court. For the proper construction of that law the Supreme Court looks to the decisions of the court of last resort of the state.

The rule that in construing state statutes the Federal Courts will follow the decisions of the court of last resort of a state is stated in the following terms in the case of *Northern Pacific Ry. Co.* v. *Meese,* 239 U. S. 614, 619:

> "It is settled doctrine that Federal Courts must accept the construction of a State statute *deliberately adopted by its highest court.*"

This has been the rule adopted by the Supreme Court from the earliest times. In *Nesmith* v. *Sheldon,* 7 How. 812, the Supreme Court said:

> "It is the established doctrine that this Court will adopt and follow the decisions of the State Courts in the construction of their own Constitution and statutes, *when that construction has been settled by the decisions of its highest tribunal.*"

In *Ankeny* v. *Hannon,* 147 U. S. 118, 126, cited by plaintiff in error, the Supreme Court said:

> "That case, it is true, was decided by the Supreme Court Commission of Ohio and not by the Supreme Court of the State, but that Commission was appointed by the Governor of the State, under an amendment of the Constitution adopted to dispose of such part of the business on the docket of the Supreme Court as should by arrangement between the Commission and the Court be transferred to the Commission. *The amendment declares that the Commission shall have like power and jurisdiction in respect to such business as may be vested in the court.* A decision of the Commission upon a question properly presented to it in a judicial proceeding is, therefore, entitled to the like consideration and weight as a decision upon the same question by the court itself, and is equally authoritative."

In quoting from this case, plaintiff in error quoted only the last sentence of the foregoing excerpt.

Counsel say that the case of *L. & N. R. Co.* v. *Kentucky,* 183 U. S. 503, 507-8, is "directly in point" in support of the contention that the opinion of the Commission construing the constitution is the decision of the "court of last resort" of the State, and is binding upon the Federal Courts. *In the case cited the Supreme Court of the United States, in construing the constitution of Kentucky, followed the decision of the Court of Appeals of Kentucky.*

In contending that the opinion of the Commission is the decision of a "court of last resort" and binding as such upon the Federal Courts, counsel at page 44 of the petition for rehearing state:

> "There are now pending in the State Courts many suits involving claims of a character similar to that involved in the case at bar, in which suits the State Courts are bound under the decisions of the Supreme Court of the State of California to regard the decisions of the Railroad Commission of the State as final and controlling."

As a matter of fact in one of the actions referred to, viz., *California Adjustment Company* v. *A. T. & S. F. Ry. Co.,* the Superior Court of Kings County rendered judgment in favor of the plaintiff, representing the shippers. The defendant appealed to the Supreme Court, and its appeal is now pending. The appellant has filed its brief on this appeal. One of the gentlemen who appeared as counsel in the case at bar is the writer of the appellant's brief in the case pending in the Supreme Court. In his brief there is no contention or suggestion that the Supreme Court in construing the Constitution is bound by the *dicta* of the Commission in the two *Scott, Magner & Miller* cases.

3. REPLY TO CONTENTION THAT THE COURTS SHOULD ADOPT THE CONSTRUCTION SAID TO HAVE BEEN PLACED BY THE COMMISSION UPON THE PROVISIONS OF THE CONSTITUTION AS THEY EXISTED PRIOR TO OCTOBER 10, 1911, IN SUPPORT OF WHICH CONTENTION PLAINTIFF IN ERROR CITES AUTHORITIES HOLDING THAT WHERE A STATUTORY PROVISION IS AMBIGUOUS, AND THE BODY CHARGED WITH ITS ADMINISTRATION HAS CONSTRUED SUCH AMBIGUOUS PROVISION, AND ITS CONSTRUCTION HAS BEEN ACQUIESCED IN FOR A LONG PERIOD OF TIME, SUCH CONSTRUCTION SHOULD BE ADOPTED BY THE COURTS.

Plaintiff in error makes no contention that the provisions of the Constitution, as it existed prior to October 10, 1911, were ambiguous, nor is it contended that there was any acquiescence in the alleged decision of the Commission. The contention is merely that the courts should adopt the Commission's view of the law as expressed in the *dicta* in the two *Scott, Magner & Miller* cases, and in support of this contention authorities are cited to the effect that where a statutory provision is ambiguous and the body charged with the administration of the statute has construed such ambiguous provision, and such construction has been acquiesced in for a long period of time, such construction should be adopted by the courts.

At page 39 of the petition for a rehearing counsel cite a number of cases decided by the Supreme Court of the United States and state "that this court in rendering its decision should under these authorities have followed the construction placed upon the Constitution and the statutory law of the State by the Railroad Commission of California."

At the risk of unduly prolonging this answer, we will examine each of these cases.

The first case cited is *New Haven R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 401. That case was commenced by the Interstate Commerce Commission against the New Haven Railroad Company and the Chesapeake and Ohio R. R. Co. to enjoin the Chesapeake & Ohio from giving rebates. The rebates were given by a subterfuge, the carrier purchasing coal at the fields and selling it to the New Haven Railway Company at New Haven, at a price which did not pay the cost of purchase, the cost of delivery and the published freight rate. The coal was sold in New Haven by the carrier for $2.75 per ton. The cost of the coal at the field plus the cost of water transportation from Newport News to New Haven was $2.47, leaving the Chesapeake & Ohio Company but 28 cents per ton for carrying the coal from the fields to Newport News. The published rate was $1.45. Prior to the bringing of this action for an injunction, the Interstate Commerce Commission had repeatedly held that the practice complained of was contrary to the provisions of the Act to Regulate Commerce, prohibiting discrimination and the giving of rebates. The defendants contended that this construction of the Act should not be adopted by the courts. The Supreme Court adhered to the Commission's view of the statute. The decision was placed especially upon the ground that after these decisions of the Commission, Congress had frequently amended the Act without changing it in this particular.

The next case cited is *U. S.* v. *Cerecedo Hermanos Y. Co.,* 209 U. S. 337, 339. This case involved the con-

struction of a clause of the tariff act. The question at issue was as to the amount of duty which should be assessed on thirty cases of red wine imported from France. The Supreme Court said that the construction of the clause contended for by the Government was right and needed no comment to make it clear. It also appeared that the Treasury Department in its published rulings had repeatedly followed the construction contended for by the Government. Referring to the rulings of the department, the Supreme Court said that "where the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution." The court also said that as the clause of the Act had been re-enacted by Congress without change after the rulings by the Treasury Department such re-enactment was an adoption by Congress of such construction.

The next case cited is *Robertson* v. *Downing,* 127 U. S. 607. This case was an action to recover duties alleged to have been illegally assessed. The plaintiff imported from Mulheim, Germany, a quantity of steel rods. They were shipped from Antwerp in Belgium. The appraisers added to the invoice value the cost of transportation from Mulheim to Antwerp. The question in the case was whether, under the statute, charges on the transportation of goods imported from one country which on their passage may pass through another country, should be added to the invoice value of the articles to make their dutiable value under Section 2907 of the tariff act of 1874. The plaintiff proved that the Treasury Department for a long period of years had construed the section of the statute to mean that such charges should not be added

where the point of shipment was in another country. The Supreme Court said:

> "This construction of the Department has been followed by many years without any attempt of Congress to change it. * * * The regulation of a department of the government is not, of course, to control the construction of an Act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it the rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

The next case cited is *U. S.* v. *Healey,* 160 U. S. 136. This case involved the construction of a section of the Act of 1877, providing for the sale of desert lands. This particular section of the act had been construed many times by the Department of the Interior. The syllabus of the case is as follows:

> "When the practice of a department in interpreting a statute is uniform, and the meaning of the statute, upon examination is found to be doubtful, or obscure, this Court will accept the interpretation of the department as the true one; but when the department practice has not been uniform, the Court must determine for itself what is the true interpretation."

The next case cited is *Komada & Co.* v. *U. S.,* 215 U. S. 392, 396. The syllabus of this case is as follows:

> "The construction given by the Department charged with executing a tariff act is entitled to great weight; and where for a number of years a manufactured article has been classified under the similitude section this court will lean in the same direction; and so held that the Japanese

beverage, sake, is properly dutiable under Section 297 of the tariff act of July 24, 1897, c. 11, 30 Stat. 151, 205, as similar to still wine and not as similar to beer.

"After a departmental classification of an article under the similitude section of a tariff law, the re-enactment by Congress of a tariff law without specially classifying that article may be regarded as a qualified approval by Congress of such classification."

The next case cited is *La Roque* v. *U. S.,* 239 U. S. 62. This case involved the allotment of lands to Indians under the Nelson Act of 1889. An Indian, Vincent La Roque, died without having selected an allotment. His father, Henry La Roque, claimed that he was entitled to the allotment on the ground that he was the sole heir. The Circuit Court of Appeals for the Eighth Circuit (170 Fed. 302) had held in another case that "until the allotment was made, the right was personal—a mere float, giving him no right to any specific property. This right from its nature would not descend to his heirs." The Department of the Interior had uniformly construed the act as giving the right only to living Indians. The Supreme Court held the "construction given the Act in the course of its actual execution is entitled to great weight."

The next case cited is *U. S.* v. *Hammers,* 221 U. S. 220. In that case the question under consideration was whether a desert land entry is assignable. The syllabus is as follows:

"Where a statute is so ambiguous as to render its construction doubtful the uniform practice of the officers of the department whose duty has been to construe and administer the statute since

its enactment and under whose constructions rights have been acquired is determinatively persuasive on the courts.

"There is confusion between the original desert land act of 1877 and the act as amended in 1891 as to whether entries can be assigned, and the court turns for help to the practice of the Land Department in construing the act, and that has uniformly been since 1891 that entries were assignable."

The next case cited is *State of Louisiana* v. *Garfield,* 211 U. S. 70. In this case one of the questions involved was whether title to swamp lands granted by Congress to a state passed to the state upon the approval by the Secretary of the Interior, or when the patent issued. The Supreme Court said that the continuous construction of the Department had been to the effect that title passed upon approval and that a great number of titles to a very large amount of land would be disturbed if the court held to the contrary.

From the cases cited by plaintiff in error it is apparent that the decisions of an administrative body will be adopted by the courts when all of the following conditions co-exist:

1. Where the statute is so ambiguous as to render its construction doubtful.

2. Where in the face of the decisions of the administrative body the legislature has amended the statute without changing the terms of the ambiguous provision construed by the administrative body.

3. Where there has been long acquiescence in a ruling of the administrative body and by it the rights of parties for many years have been determined and adjusted.

4. Where the decision of the administrative body has been acquiesced in by all the departments of the government for a long period.

Now let us see whether any of these conditions exist here. *The long and short haul clause of the Constitution, as it existed prior to the amendment of October* 10, 1911, *was not ambiguous.* In plain and unequivocal terms it conferred upon the shippers of freight the right to have their goods transported at charges not exceeding the charges to more distant points. Section 22 of Article I of the Constitution provides that "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." In *Matter of Maguire,* 57 Cal. 604, the Supreme Court of California, with reference to this provision, said:

> "The Constitution furnishes a rule for its own construction. That rule is that its provisions are mandatory and prohibitory, unless by express words they are declared to be otherwise (Article 1, Section 22). We find no such express words in the Constitution. *This rule is an admonition placed in this, the highest of laws in this State, that its requirements are not meaningless, but that what is said is meant, in brief, 'we mean what we say.' Such is the declaration and command of the highest sovereignty among us, the people of the State, in regard to the subject under consideration."*

And in *McDonald* v. *Patterson,* 54 Cal. 247, the Supreme Court said:

> "In the construction of this Constitution, the rules expressed in Section 22, Article I, *must always be regarded.* That section declares that

'the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.'

"*Now, in the light of this rule, laid down in words so clear and terms imperative,* we will examine the sections above referred to.

"The language of Section 19, of Article II, is both mandatory and prohibitory in its character. It is clear and unambiguous. *It is difficult to see that it could have been made stronger in its words of command and prohibition. What words more vigorous or more appropriate to their manifest purpose could have been found in the whole compass of the English tongue we are at a loss to determine.*"

Never while the long and short haul clause of the Constitution, as it stood prior to October 10, 1911, was in existence, did the Railroad Commission ever even intimate that it had power to establish rates in contravention thereof. The *Scott, Magner & Miller* cases were decided, one in April and the other in August, 1913. Before these decisions were rendered by the Commission the constitutional provision, as it existed prior to October 10, 1911, had been abrogated. The Commission in these two cases was not attempting to construe an existing law, but one which had been repealed.

Nor do counsel for plaintiff in error contend that there was any ruling of the Commission that has been acquiesced in by the courts and the people. At page 41 of the Petition for Rehearing, the following statement is made:

"Never since the adoption of the Constitution in 1879 until the cases recently decided by the

California Railroad Commission have the questions involved in this suit been raised."

As there was no ambiguous provision to be construed by the administrative body, and as the administrative body had never construed any provision ambiguous, or otherwise, while it was an existing law, it follows that never in the face of any decision of the administrative body did the people amend the Constitution without changing the terms of the ambiguous provisions. In fact, the provisions of the Constitution in relation to common carriers were never amended prior to October 10, 1911.

There never was long or any "acquiescence in the rulings of the administrative body. The case at bar and all the other actions pending in the state courts brought to recover charges exacted in violation of the long and short haul clause of the Constitution, as it existed prior to October 10, 1911, were pending in the courts long before the Commission uttered the *dicta* in the first *Scott, Magner & Miller* case. That case was decided by the Commission on April 15, 1913. This action was begun on January 14, 1913. Some of the actions pending in the state courts were commenced over a year before the decision of the Commission in the first *Scott, Magner & Miller* case. The action under consideration by the District Court of Appeal in *Southern Pacific Company* v. *Superior Court* (20 Cal. App. Dec. 674, 27 Cal. App. Rep. 240), and by the Supreme Court in *Southern Pacific Company* v. *Superior Court* (50 Cal. Dec. 36, 150 Pac. 404), was commenced on July 12, 1912. (27 Cal. App., pg. 240.)

Nor was the complainant in the *Scott, Magner & Miller* cases "acquiescing" in any ruling of the Commission. In 1912, they were insisting on their consti-

tutional rights. As we have already seen, however, they were never deprived of any rights under the Constitution, as it existed prior to October 10, 1911, the charges which they paid not having been in violation of the Constitution as it existed before that date. *The fact is that no controversy was ever before the Commission involving a violation of the long and short haul clause of the Constitution as it existed prior to October* 10, 1911. Nor would it have made one iota of difference if the *Scott, Magner & Miller* cases had involved charges in violation of the Constitution as it existed prior to October 10, 1911. The situation there would have been that some dissatisfied shippers attempted to enforce his remedy before the Commission, and because of an erroneous view of the law by the Commission they were denied relief, whereas other aggrieved shippers at the same time sought relief in the courts.

Moreover the Commission had no jurisdiction of the controversy involved in the two *Scott, Magner & Miller* cases. As the controversy involved was not within the jurisdiction of the Commission, its opinion rendered on determining such a controversy is entitled to no weight whatsoever. In *Southern Pacific Company* v. *Superior Court,* 20 Cal. App. Dec. 674 (27 Cal. App. Rep. 240, 255), the District Court of Appeal held that the Commission had no jurisdiction to pass upon alleged illegal charges such as were the subject of controversy in the *Scott, Magner & Miller* cases. The Court said:

> "The jurisdiction to pass upon an alleged illegal charge of this kind is necessarily vested in the courts, because the law has provided no other source of relief."

As there had been no decision by the Railroad Commission construing the Constitution as it existed prior to October 10, 1911, until after these constitutional provisions were abrogated, there, of course, could not have been any "acquiescence" on the part of all or any departments of the government in such a construction. As a matter of fact, however, in 1908 the Attorney General of the State advised the Railroad Commission that it had no power to authorize the carriers to charge a higher rate for the shorter than for the longer distance.

At page 41 of the Petition for Rehearing counsel say "the bench and bar, carriers and shippers alike, have regarded the law as settled" that rates "established" by the Commission were legal whether they violated the prohibition of the Constitution as it existed prior to October 10, 1911, or not.

Practically the same statement was made in plaintiff in error's first brief where it was said that "for more than thirty years the provisions of Section 21 of Article XII had been treated by the public, the Commission and the carriers as controlled by the provisions of Section 22, giving the Commission the power to fix rates."

This contention was replied to at pages 81 et seq. of the Supplemental Brief of defendant in error. As there pointed out, if what counsel state were the fact, it would make not a particle of difference. A plain unambiguous provision of the supreme law of the State could not be rendered nugatory because for "thirty years" the carriers had succeeded in ignoring it, or because the Commission had failed in its duty,

or because such of the public as were affected by its violation had submitted to the unlawful demands of the carriers. This contention in effect is that plaintiff in error acquired by prescription the right to violate the law and to deprive the assignors of defendant in error of their constitutionality conferred right to have their property transported at charges not exceeding those made for the longer distance.

It is not a fact that the Commission so construed the constitutional provisions for "thirty years." The first time that the Commission ever so construed it, as far as we can ascertain, was when it rendered its decision in the *Scott, Magner & Miller* case (2 C. R. C. 626) on April 15, 1913, which was about three months after this action was commenced. Moreover, in that case the Commission, although it expressed the view that the Constitution should be so construed, expressly stated that as the matter was not involved it would not consider it further (p. 631). If the Commission so "construed" the constitutional provision when on June 11, 1909, it received for filing the tariffs filed with the Commission by the plaintiff in error, we do not know that such is the fact as the order merely stated that the tariffs filed "were received and filed * * * and that said rates, fares and charges shall be the lawful rates, fares and charges of said carriers respectively, subject to be changed by this Commission, pursuant to the provisions of Section 19 of the aforesaid Act." The Commission had no discretion about "receiving and filing" them, and its statement that they should be the "lawful rates" was merely a statement of a conclusion of law. They became lawful rates (provided they did not violate the Constitution) when

the schedules containing them were filed. The Commission probably assumed in making these schedules the carriers had observed the constitutional provisions. Prior to the enactment of the Statute of 1909 there was no law which required a carrier to file its tariffs with the Commission. By its order of June 11, 1909, the Commission merely received for filing certain tariffs filed with the Commission, but made no attempt to establish any rates different from those proposed by the carriers. The "thousands of rates" referred to by counsel are evidently the rates specified in these tariffs prepared and filed by the carriers.

The first order of the Commission establishing a rate was made on November 22, 1887. On that date the rate from San Francisco to Pajaro and Watsonville was ordered reduced ten per cent. In ordering the rate reduced the Commission expressly directed that the reduced rate should be the maximum rate to all intermediate points. The order provided:

> "And in no instance, after the said ten per cent reduction, shall the reduced rate for the long haul be less than that charged for the shorter haul, and that the reduced long haul rate shall be the maximum charge for the shorter haul."
> (Vol. 1 of Minutes, pg. 32.)

For some reason which is not apparent the order reducing the rates was never put into effect.

Prior to the year 1908 *the Commission had never established any rates except in a few isolated cases.* This appears from the decision of the Commission in *Re Matter of Alleged Discrimination by Southern Pacific Company* (Decision No. 102 rendered Janu-

ary 12, 1909, Annual Report of Railroad Commission for the year 1908, pg. 51).

In that case the Railroad Commission decided, in view of the fact that before the date of the discrimination complained of the Commission had not, except in a few isolated instances, established any rates, that the penalties provided by the Constitution for charging rates in excess of the established rates could not be enforced. The Commission said:

> "In the preparation for the investigation the Attorney General had carefully examined the records of the Board of Railroad Commissioners to ascertain if the Constitutional mandate that they should
>
> > 'Establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such charges as they shall make'
>
> had been properly complied with. He found that prior to January, 1908, it had not except in a few isolated cases, and after stating that fact in his argument, added:
>
> > 'It now follows, therefore, gentlemen, that with the exception of such rates as the Commission has established, the penalty cited in the Constitution provision does not apply.'
>
> It cannot therefore be said in this decision that the Southern Pacific Company has failed to move traffic in conformity with established rates, or has charged rates in excess thereof, because during the time comprehended in this investigation there were no established rates."

On January 17, 1908, the Commission passed the following resolution (Vol. 3 of Minutes, pg. 198):

> "*Whereas,* It does not appear from the records of this Board that the rates in effect in this State have ever been established by the Board, and
>
> "*Whereas,* Such action on the part of the Board seems to be necessary to complete the placing of transportation companies within its control and jurisdiction, *Now, Therefore, Be It Resolved:* That the rates published by the various transportation companies in effect on their various lines, are hereby adopted as the rates of this Commission, subject to review and correction upon complaint and investigation."

Just how the "bench and bar, carriers and shippers" could for thirty years have "regarded" that rates "established" by the Commission were valid, whether or not they were in conflict with the long and short haul clause of the Constitution, is not apparent in view of the fact that never until 1908 did the Commission attempt to establish any rates. In not one of the isolated cases where the Commission did establish rates prior to 1908, did the Commission attempt to establish any rates which conflicted with the long and short haul clause of the Constitution.

Even after 1908 the Commission, as we have seen, merely "approved" the tariffs filed by the carriers. In so doing they may have assumed that if any of the tariffs specified a higher rate for a shorter distance than was specified for a longer distance the rate for the longer distance became the maximum rate for the shorter distance.

In plaintiff in error's brief the statement was that

the "public, the Commission and the carriers" treated the prohibition as controlled by the provision of Section 22, giving the Commission the power to fix rates. To the "public, the Commission and the carriers" the plaintiff in error has, in its Petition for Rehearing, added the "bench and bar." And yet this statement as to the views of the "bench and bar" immediately follows the statement quoted above to the effect that never since the adoption of the Constitution in 1879 until the cases recently decided by the California Railroad Commission have the questions involved in this suit been raised.

As a matter of fact the bench of this State has uniformly held that the Commission had no power, prior to October 10, 1911, to establish rates which violated the long and short haul prohibition. Such was the holding of the Superior Court of Kern County (Hon. Howard A. Peairs, Judge) in the judgment reviewed by the District Court of Appeal and by the Supreme Court in *Southern Pacific Company* v. *Superior Court of Kern County* (20 Cal. App. Dec. 674, 27 Cal. App. Rep. 240, 50 Cal. Dec. 36).

The Superior Court of Kings County (Hon. M. L. Short, Judge) also held the same way in the action of *California Adjustment Company* v. *Atchison, Topeka & Santa Fe Railway Company.* In that case Judge Short held that the Commission had no power, prior to October 10, 1911, to establish rates which violated the constitutional provision. The appeal of the defendant from the judgment in that case is now pending in the State Supreme Court. (Sacramento No. 2584.)

In no case that has ever been called to our attention

have any of the Superior Courts of this State adopted the construction of the Constitution contended for by plaintiff in error.

We are quite certain that the members of the bar in the towns of the San Joaquin Valley who were consulted about this matter in 1909 and 1910 did not "regard" the law as settled that the Commission could establish rates which contravened the provisions of Section 21 of Article XII of the Constitution. And we are likewise quite certain that the shippers whose rights are involved in this action never so "regarded" the law. We are advised by a number of these shippers that in the years 1909 and 1910 they consulted their local attorneys in regard to the matter and were advised that they were being overcharged. Some of these shippers took the matter up with the local representative of the carriers and were told that the long and short haul provision of the Constitution was "unconstitutional." They were also informed by the carriers' representatives that if any action was taken the carriers would take the case to the United States Supreme Court. It was never intimated to these shippers that the rates were legal because "established" by the Commission. The amount which any individual shipper was overcharged was comparativcly trifling, as nearly all the shipments were small. Hence the shippers deemed it better policy to pay the charges than to incur the expense of litigation extending over a number of years. In 1911, however, some of the shippers into the San Joaquin Valley organized for the purpose of recovering the charges which they conceived to be excessive and organized the California Adjustment Company. Other shippers joined them and thereby the expense

of the litigation did not fall too heavily upon any one shipper.

In 1911, before the amendment to the Constitution of October 10, 1911, one of the most prominent members of the bar of this city furnished a written opinion to clients who were shipping from San Francisco to points in the San Joaquin Valley. In his opinion this gentleman advised his clients that under no pretext could the carriers charge higher rates to the intermediate points. In his opinion the following statement is made:

> "It is clear that it is not legal for the railroad to charge more for the shorter haul, inasmuch as this is expressly forbidden by the Constitution."

Another matter may be referred to here, although it is not really pertinent to the reply to the petition for a rehearing, but is, nevertheless, interesting in view of certain contentions made by plaintiff in error in this case. Counsel for plaintiff in error in their briefs have contended, upon the assumption that rates violative of the long and short haul provisions of the Constitution as it existed prior to October 10, 1911, were lawful, that "chaos" would result from the "immediate operation" of the amendment to the Constitution of October 10, 1911. In this connection it is interesting to note what the Commission said in the second *Scott, Magner & Miller* case (3 C. R. C. 339, 341), decided August 2, 1913. In that case Mr. Commissioner Loveland, who wrote the opinion, stated that an order made by the Commission on June 11, 1909, "establishing" the rates contained in all the tariffs on file prior to that date, made legal all rates specified therein which violated the constitutional provision. Mr. Loveland then called attention (pg.

341) to the "Stetson-Eshleman Act" which went into effect on February 10, 1911. Referring to this Act the Commissioner said:

> "In this connection, I wish to draw attention to Section 17 of the Stetson-Eshleman Act, which went into effect on February 10, 1911. Under the provisions of this section, it was made the duty of the railroads to file tariffs with the Commission, and it made it the duty of the Commission to establish the rates so filed, or others in lieu thereof, within at least thirty days from the date the rates were filed. Under the provisions of this section the defendant company filed a tariff which included the rates covering the shipment of hay between the points involved in this proceeding. On June 2, 1911, the Commission passed a resolution approving such of the rates contained in the tariff so filed as were not in violation 'of the provisions of the Constitution or statutes of California.'"

The Commissioner then expressed the opinion that the order of June 2, 1911, had the effect of disestablishing the rates violative of the Constitutional provision theretofore "established" by the order of June 11, 1909, and that no rates in violation of the Constitution contained in such tariffs were legal after June 2, 1911. What counsel contend the people could not accomplish by an amendment to the Constitution was accomplished, according to Commissioner Loveland, by the terms of the order of the Commission made on June 2, 1911. According to the Commissioner's opinion in this case the complainants were entitled to reparation for all charges in violation of the long and short haul clause of the Constitution which were exacted subsequent to June 2, 1911.

SUMMARY OF ARGUMENT IN ANSWER TO CONTENTIONS MADE IN PETITION FOR REHEARING

The foregoing argument may be very briefly summarized.

The obvious answer to the contention, based upon the decision in the case of *Pacific Tel. & Tel. Co.* v. *Eshleman,* 166 Cal. 644, that the opinions of the Commission construing the Constitution and construing its own orders are binding on the courts, is that the case cited decides nothing of the kind, but merely holds, in the language of Section 67 of the Public Utilities Act, that the findings and conclusions of the Commission on questions of fact are made final and not subject to review.

The answer to the contention that the Railroad Commission is the "court of last resort" of California and that its opinions on questions of law are binding upon the Federal courts, is that the Railroad Commission is not the court of last resort of California. Because its findings of fact are final it does not follow that its opinions on questions of law are authoritative. The "court of last resort" of this state is the Supreme Court. As stated in *Northern Pacific Ry. Co.* v. *Meese,* 239 U. S. 614, 619, "It is the settled doctrine that Federal Courts must accept the construction of a state statute deliberately adopted by its highest court."

The answer to the contention that the courts should adopt the construction said to have been placed by the Commission upon the Constitution as it existed prior to October 10, 1911, is that the construction placed upon a statute by an administrative body will be adopted only where the statute is ambiguous, and

where the rulings of the administrative body have been acquiesced in for a long period of time, and especially where the legislature, after the ruling of the administrative body has amended the statute without changing the terms of the ambiguous provision construed by the administrative body. Not one of these conditions exist here. The provision of the Constitution, as it existed prior to October 10, 1911, is not ambiguous. The so-called rulings of the Commission in the two *Scott, Magner & Miller* cases were rendered nearly two years after the constitutional provision in question had been abrogated. What was said by the Commission was merely *dicta* as it was conceded that the charges collected by the carriers did not violate the terms of the Constitution. There was no "acquiescence" in the rulings, the fact being that actions by shippers to recover freight charges exacted in violation of the constitutional provision were pending in the courts over a year before the "rulings" of the Commission in the cases referred to. Moreover, while the constitutional provision, as it existed prior to October 10, 1911, was in force the Attorney General advised the Commission that it had no power to authorize the carriers to charge higher rates for the shorter distance. Furthermore, the proceedings in the two *Scott, Magner & Miller* cases were null and void, as the Commission had no jurisdiction of the controversy (*Southern Pacific Company* v. *Superior Court,* 20 Cal. App. Dec. 674).

It is respectfully submitted that the petition for rehearing should be denied.

HOEFLER, COOK, HARWOOD & MORRIS,
ALFRED J. HARWOOD,
Attorneys for Defendant in Error.

No. 2644

United States

Circuit Court of Appeals

For the Ninth Circuit.

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Appellants,*

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, LIMITED, a corporation, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD, and R. C. McKINNEY, *Appellees.*

CRANE CREEK IRRIGATION DISTRICT, and SUNNYSIDE IRRIGATION DISTRICT,

Cross-Appellants,

vs.

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Cross-Appellees.*

Transcript of Record

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 87674

United States

Circuit Court of Appeals

For the Ninth Circuit.

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Appellants,*

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, LIMITED, a corporation, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD, and R. C. McKINNEY, *Appellees.*

CRANE CREEK IRRIGATION DISTRICT, and SUNNYSIDE IRRIGATION DISTRICT,

Cross-Appellants,

vs.

MANEY BROTHERS & CO., (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Cross-Appellees.*

Transcript of Record

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

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In the District Court of the United States for the District of Idaho, Southern Division.

IN EQUITY. No. 511.

PORTLAND WOOD PIPE COMPANY, a Corporation, Plaintiff,

VS.

SLICK BROTHERS CONSTRUCTION COMPANY, LIMITED, a corporation, et al., Defendants,

AND

MANEY BROTHERS & CO. (a Co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells, Cross-complainant,

VS.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, a Corporation, CRANE CREEK IRRIGATION DISTRICT, a corporation, SUNNYSIDE IRRIGATION DISTRICT, a Corporation, IDAHO NATIONAL BANK, a Corporation, C. R. SHAW WHOLESALE COMPANY, a Corporation, UTAH FIRE CLAY COMPANY, a Corporation, PORTLAND WOOD PIPE COMPANY, a Corporation, SLICK BROTHERS CONSTRUCTION COMPANY, LIMITED, a Corporation, PETE MARCH, G. A. HEMAN, J. M. PINCKARD, F. A. SQUIER, S. C. COMERFORD, JIM MIREHOUSE, GUY COMERFORD, WM. R. COMERFORD, JAMES M. MAGEE, C. A. SMITH, J. L. SMITH, GEO. F. SMITH, CLAUD

F. SMITH, A. T. SCHWAB, L. F. EASTON, A. L. CHENOWETH, GEO. C. CATER, E. D. FORD, A. G. BUTTERFIELD, and R. C. McKINNEY, Cross-Defendants.

CROSS-BILL OF MANEY BROTHERS & CO.

To the Honorable, the Judges of the District Court of the United States for the District of Idaho, Southern Division:

And now comes Maney Brothers & Co., one of the defendants above named, and files this its cross-bill herein against Crane Creek Irrigation Land & Power Company, a corporation organized and existing under the laws of the State of Idaho and a citizen of said State, Crane Creek Irrigation District, a corporation organized and existing under the laws of the State of Idaho, and a citizen of said State, Sunnyside Irrigation District, a corporation organized and existing under the laws of the State of Idaho and a citizen of said State, Idaho National Bank, a corporation organized and existing under the laws of the United States and doing business in the State of Idaho, and a citizen of said State, C. R. Shaw Wholesale Company, a corporation organized and existing under the laws of the State of Nevada and doing business in the State of Idaho under and by virtue of a compliance with the laws of the State of Idaho, and a citizen of said State of Nevada, Utah Fire Clay Company, a corporation organized and existing under the laws of the State of Utah and a citizen of said State, Portland Wood Pipe Company,

a corporation organized and existing under the laws of the State of Oregon, and a citizen of the State of Oregon, Slick Brothers Construction Company, a corporation organized and existing under the laws of the State of Idaho and a citizen of the State of Idaho, Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Begley, James M. Magee, C. A. Smith, J. L. Smith, Geo. F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, L. F. Easton, A. L. Chenoweth, Geo. C. Cater, J. C. Toney, Thomas Sherry, E. H. Hasbrouch, E. D. Ford, A. G. Butterfield and R. C. McKinney, each residents and citizens of the State of Idaho, and G. A. Heman, a resident of St. Louis, Missouri, and a citizen of said State of Missouri. And thereupon this cross-complaint complains and alleges:

I.

That at all the times hereinafter mentioned this cross-complainant, Maney Brothers & Co., was and still is a co-partnership consisting of J. W. Maney, a citizen and resident of the State of Oklahoma, residing in Oklahoma City, said State, and John Maney, a citizen and resident of the State of Oklahoma, residing in the city of El Reno, said State, and Herbert G. Wells and E. J. Wells, both citizens and residents of the State of Idaho, residing in the city of Boise, said State.

II.

That the defendant, Crane Creek Irrigation Land & Power Company, is, and at all the times herein-

after mentioned was, a corporation organized and existing under the laws of the State of Idaho, with its principal place of business at Weiser, Washington County, Idaho, and is a citizen of the State of Idaho.

III.

That the defendants Crane Creek Irrigation District and Sunnyside Irrigation District are, and at all the times hereinafter mentioned were, corporations, and each of them is a corporation organized and existing under the laws of the State of Idaho, and particularly under the provisions of Title 14, Political Code, Revised Codes of Idaho, and the laws supplemental to and amendatory thereof, with their principal place of business at Weiser, Washington County, Idaho, and each of them is a citizen of the State of Idaho.

IV.

That the defendant, Idaho National Bank, is, and at all the times hereinafter mentioned was, a corporation organized under the laws of the United States, and engaged in general banking business as a national bank in the city of Boise, Ada County, Idaho, and is a citizen of the State of Idaho.

V.

That the defendant, C. R. Shaw Wholesale Company, is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Nevada, and doing business in the State of Idaho under and by virtue of a compli-

ance with the laws of the State of Idaho, with its principal place of business at Boise, Ada County, Idaho, and is a citizen of the State of Nevada.

VI.

That the defendant, Utah Fire Clay Company, is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Utah, and is a citizen of the State of Utah.

VII.

That the defendant herein, Portland Wood Pipe Company, is a corporation organized and existing under the laws of the State of Oregon, and is a citizen of the State of Oregon.

VIII.

That the defendant, Slick Brothers Construction Company, Limited, is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Idaho, with its principal place of business at Boise, Ada County, Idaho, and is a citizen of the State of Idaho.

IX.

That each of the following named defendants, to-wit: Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Begley, James M. Magee, C. A. Smith, J. L. Smith, Geo. F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, L. F. Easton, A. L. Chenoweth, Geo. C. Cater, J. C. Toney, Thomas Sherry, E. H. Hasbrouch, E. D. Ford, A. G.

Butterfield and R. C. McKinney, is, and at all the times hereinafter mentioned was, a resident of the State of Idaho.

X.

That the defendant, G. A. Heman, is, and at all the times hereinafter mentioned was, a resident of St. Louis, Missouri, and is a citizen of the State of Missouri.

XI.

That the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

XII.

That on the 7th day of November, 1914, the said Portland Wood Pipe Company, plaintiff in the above named suit and one of the defendants to this cross-complainant's cross-bill herein, filed its bill of complaint in this court against this cross-complainant and the other parties to this suit for the foreclosure of a mechanic's lien alleged to cover a certain irrigation system, reservoir, water rights and water appropriations and the rights of way therefor, constructed by or at the instance and request of the said Crane Creek Irrigation Land & Power Company, which system is hereinafter more particularly described, being the identical irrigation system described in this cross-complainant's mortgage herein sought to be foreclosed; that said suit is still pending in this court, and for a more particular statement of the relief therein sought by said Portland

Wood Pipe Company and the proceedings therein had reference is hereby made to the records and files in said cause.

XIII.

That on or about the 29th day of September, 1911, the defendant, Crane Creek Irrigation Land & Power Company, for a valuable consideration, made, executed and delivered to this cross-complainant its certain promissory note, in words and figures following, to-wit:

> $87,000.00 Weiser, Idaho, September 29, 1911.
>
> FOR VALUE RECEIVED, The Crane Creek Irrigation Land & Power Company, a corporation, promises to pay to the order of Maney Bros. & Co., at the Boise City National Bank at Boise, Idaho, on the 15th day of November, 1912, the sum of Eighty-seven Thousand Dollars ($87,000.00), in lawful money of the United States, with interest thereon at the rate of six per cent. (6%) per annum from November 15th, 1911.
>
> In case suit or action be instituted for the collection of this note, or any portion thereof, the undersigned agrees to pay, in addition to costs and disbursements allowed by statute, such sum as the court may adjudge reasonable as attorneys' fees in said suit or action.
>
> CRANE CREEK IRRIGATION LAND & POWER COMPANY,
>
> (Corporate Seal) By E. D. Ford, President.
>
> Attest: E. P. Hall, Secretary.

XIV.

That, for the purpose of securing the payment of said note, principal and interest, together with any and all other indebtedness of said defendant to this cross-complainant, whether evidenced by note or notes or otherwise, and together with any sum or sums which this cross-complainant might pay or deem it necessary to pay in order to protect the property hereinafter described, or any part thereof, or any rights of this cross-complainant or of said Crane Creek Irrigation Land & Power Company therein, because of any prior lien or claim or other charge against the same, whether created before or after the execution of said note, the said Crane Creek Irrigation Land & Power Company, on or about the said 29th day of September, 1911, made, executed, acknowledged and delivered to this cross-complainant its certain mortgage, bearing date of September 29th, 1911, wherein and whereby the said defendant Crane Creek Irrigation Land & Power Company mortgaged, as aforesaid, to this cross-complainant the following described property in Washington County, Idaho, to-wit:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford, on the 3rd day of September, 1907, which said application was approved by Thos. Ryan, Acting Secretary of the Interior, on the 26th day of

October, 1907; which said reservoir, as shown by said map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred and seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir is situated in the Southeast Quarter (SE¼) of the Southeast Quarter (SE¼) of Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the Government of the United States.

(b) All canals, ditches, headgates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used, or required in connection with the distribution of the water from said reservoir, and for carrying and distributing said water to the place or places of intended use, now owned or constructed, or which may hereafter be acquired or constructed by the said Crane Creek Irrigation Land & Power Company, with the rights of way therefor.

(c) All water rights and rights to the use of water in connection with the reservoir and irrigation works hereinbefore described, now owned, or that may hereafter be acquired, by said Crane Creek Irrigation Land & Power Company, and particularly including the following permits issued by the State Engineer of the State of Idaho, all of which said permits are now owned and held by the Crane Creek Irrigation Land & Power Company, said permits being issued on the dates and numbered and recorded

in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sept. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sept. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

(d) The lands, described as follows:

The SE¼ of Sec. 5.

E½ of the SE¼, and the SW¼ of the SE¼ of Sec. 10

NE¼ of the NE¼ of Sec. 15

E½ of the NE¼ of Sec. 10

N½ of the SE¼ of Sec. 17

E½ of the NW¼ of Sec. 17

SE¼ of the SW¼ of Sec. 8

SE¼ of the NW¼, and the E½ of the SW¼ of Sec. 11

NE¼ of the NW¼ of Sec. 14

NW¼ of the NW¼ of Sec. 8

NW¼ of the NE¼, and the N½ of the NW¼, and the SW¼ of the NW¼ of Sec. 12

Lot No. 4, and the SE¼ of the SW¼ of Sec. 7,

All in Township Ten (10) North, Range Four (4) West, B. M.

The SW¼ of Sec. 27

N½ of the NE¼, and the SE¼ of the NE¼, and the NE¼ of the SE¼ of Sec. 13

All in Township Eleven (11) North, Range Four (4) West, B. M.

And the E½ of the SE¼ of Sec. 12, Township Ten (10) North, Range Five (5) West, B. M., containing 1440 acres, more or less.

Also the following described lands, the legal title to which now stands in the State of Idaho, but certificates for the purchase of which are held by the said Crane Creek Irrigation Land & Power Company, to-wit:

The NE¼ of the NW¼ of Sec. 9
NW¼ of the NE¼ of Sec. 9
NE¼ of the SW¼ of Sec. 9
NW¼ of the SW¼ of Sec. 9
SW¼ of the SW¼ of Sec. 9
SW¼ of the SW¼ of Sec. 4
SE¼ of the SW¼ of Sec. 4
SW¼ of the SE¼ of Sec. 4
SE¼ of the NW¼ of Sec. 7
NE¼ of the SE¼ of Sec. 8
NW¼ of the SE¼ of Sec. 8
SW¼ of the NE¼ of Sec. 9
SE¼ of the NW¼ of Sec. 9
NW¼ of the SE¼ of Sec. 9
SW¼ of the NE¼ of Sec. 10
NE¼ of the NW¼ of Sec. 10
All in Township Ten (10) North, Range Four (4) West, B. M.

The NW¼ of the NE¼ of Sec. 33

SW¼ of the NE¼ of Sec. 33
NE¼ of the NW¼ of Sec. 33
NW¼ of the NW¼ of Sec. 33
SW¼ of the NW¼ of Sec. 33
SE¼ of the NW¼ of Sec. 33
NE¼ of the SW¼ of Sec. 33
NW¼ of the SW¼ of Sec. 33
All in Township Eleven (11) North, Range Four (4) West, B. M.

The SE¼ of the SW¼ of Sec. 2, Township Ten (10) North, Range Five (5) West, B. M.

The NE¼ of the NE¼ of Sec. 10
SW¼ of the NE¼ of Sec. 10
SE¼ of the NE¼ of Sec. 10
NE¼ of the SE¼ of Sec. 10
NW¼ of the SE¼ of Sec. 10
SW¼ of the SE¼ of Sec. 10
SE¼ of the SE¼ of Sec. 10
NW¼ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 13
NW¼ of the NW¼ of Sec. 13
NE¼ of the NE¼ of Sec. 14
NE¼ of the NE¼ of Sec. 15
NW¼ of the NE¼ of Sec. 15
SW¼ of the NE¼ of Sec. 15
All in Township Eleven (11) North, Range Six (6) West, B. M.

The SW¼ of the SW¼ of Sec. 36
SW¼ of the SE¼ of Sec. 36
SE¼ of the SE¼ of Sec. 36
NE¼ of the SE¼ of Sec. 36

NW¼ of the SE¼ of Sec. 36
All in Township Eleven (11) North, Range Five (5) West, B. M., containing 1760 acres, more or less.

Together with all rights of way, reservoirs, dams, canals, flumes, pipe lines, ditches and other structures forming a part of said irrigation system, whether then owned by the said Crane Creek Irrigation Land & Power Company, or thereafter constructed or acquired by said Company, with all the easements, rights of way, privileges, and appurtenances thereunto belonging or in anywise appertaining, a copy of which said mortgage is hereto attached, marked Exhibit "A" and made a part hereof; and this cross-complainant prays leave to refer to said exhibit for a full and particular statement of the terms and provisions thereof and the property included therein.

XV.

That said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was on the 6th day of October, 1911, filed for record in the office of the County Recorder of Washington County, Idaho, and recorded in Book 15 of Mortgages, page 403, et seq.

XVI.

That the total indebtedness of said Crane Creek Irrigation Land & Power Company to this cross-complainant, exclusive of interest, secured by said mortgage, was the sum of $90,992.38; that on the 24th day of June, 1913, the said Crane Creek Irrigation Land & Power Company paid to this cross-com-

plainant on account of such indebtedness and accumulated interest thereon at the rate of six per cent. per annum from November 15, 1911, the sum of $60,000.00, and on the 27th day of December, 1913, the said defendant paid to this cross-complainant the sum of $5,000.00, leaving a balance due this cross-complainant of $35,986.10, with interest thereon from the 27th day of December, 1913, at the rate of six per cent. (6%) per annum; that no other payments on account of said indebtedness have been made to this cross-complainant by said defendant or any one for it.

XVII.

That the said defendant Crane Creek Irrigation Land & Power Company has defaulted in the payment of taxes and other sums and payments required to be paid in order to protect the interest of this cross-complainant in said property, as well as the interest of said defendant Crane Creek Irrigation Land & Power Company, and this cross-complainant may at any time be required to make large payments for taxes and other purposes in order to protect its interest therein, and it therefore prays that it may be permitted on final hearing to make proof of such payments and to be reimbursed therefor, as fully as if such payments had been made prior to the filing of this cross-bill and were herein specifically set forth.

XVIII.

That since the execution and delivery of said mortgage this cross-complainant released from the lien

thereof the following lands and premises, and no other, to-wit:

The SW¼ of the SW¼, the SE¼ of the SW¼, and the SW¼ of the SE¼ of Sec. 4,

The NW¼ of the NW¼ of Sec. 8; and

The SW¼ of the NE¼, the NW¼ of the NE¼, the SE¼ of the NW¼, and the NE¼ of the NW¼ of Section 9, all in Township Ten (10) North, Range Four (4) West, B. M;

and the said mortgage and the lien created thereby is in full force and effect as against all property, rights and franchises described in said mortgage, excepting the lands released as aforesaid, and against the said irrigation system therein referred to and more particularly described as follows, to-wit:

That certain canal on the southerly side of Crane Creek and crossing the west boundary line of the Crane Creek Irrigation District near the center of Section Seven (7), Township Eleven (11) North, Range Three (3) West, Washington County, Idaho, and extending thence in a southerly direction through Sections 7, 18, 19 and 30 and into Section 31 of said township and range; thence in a northerly and easterly direction through said Sections 31 and 30 and into and through Sections 25 and 36 in Township 11 North, Range 4 West; thence in a southerly and westerly direction through Sections 1, 2, 11, 10, 15, 16, 21, 28, 20, 29, 17, 19 and 18 in Township 10 North, Range 4 West, B. M., and thence in a southerly and westerly direction through Sections 13 and 24 to a point near what is known as Buttermilk Slough in

the Northeast Quarter (NE¼) of Section 23, Township 10 North, Range 5 West, B. M. Also that certain siphon and branch canal, branching off or extending from the main canal, hereinbefore described, in the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section 36, Township 10 North, Range 4 West, B. M., and extending across Weiser River in a northwesterly direction through Sections 35, 26, 23 and 22, and in a southerly and westerly direction through Sections 27, 28 and 32, Township 11 North, Range 4 West, B. M. And all branch canals, main and subordinate laterals, service ditches, pipe lines, headgates and other structures of every kind and nature, used or intended to be used in connection with said irrigation system, or any part thereof; and all water rights and water appropriations made for use in connection therewith, including the water permits hereinbefore described and Permit No. 8507, recorded in Book 27 of the records in the office of the State Engineer of the State of Idaho, at page 8507, and issued by the State Engineer of the State of Idaho, on August 10, 1912; being the identical irrigation system, water rights and water appropriations described in the lien of the said Portland Wood Pipe Company and the bill herein foreclosing such lien.

XIX.

That no bonds, notes, mortgages, contracts or securities of any kind whatsoever were deposited by the said Crane Creek Irrigation Land & Power Company with the Trustee named in said mortgage for

such purpose, as additional security for the payment of the said indebtedness to this cross-complainant, as contemplated and permitted by sub-paragraphs numbered 1, 2, 3, 4, 5, 7, 8, 9 and 10 of said mortgage (Exhibit "A"); and the said defendant Crane Creek Irrigation Land & Power Company, has not exercised or availed itself of any of the provisions contained in said sub-paragraphs.

XX.

That the said note and the mortgage securing the same provide that the said defendant Crane Creek Irrigation Land & Power Company shall pay a reasonable attorney's fee for foreclosing said mortgage or the bringing of suit thereon, and this cross-complainant alleges and shows that the sum of Four Thousand Dollars ($4,000.00) is a reasonable attorney's fee for conducting said foreclosure and should be allowed this cross-complainant herein.

XXI.

That the said defendants Crane Creek Irrigation District, Sunnyside Irrigation District, Idaho National Bank, C. R. Shaw Wholesale Company, Utah Fire Clay Company, Portland Wood Pipe Company, Slick Brothers Construction Company, Limited, Pete March, G. A. Heman, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Begley, James M. Magee, C A. Smith, J. L. Smith, Geo. F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, L. F. Easton, A. L. Chenoweth, Geo. C. Cater, J. C. Toney,

Thomas Sherry and E. H. Hasbrouch have, or claim to have, some interest, lien or claim in, to, or upon the said premises, canals, reservoir, irrigation works, water rights and structures, or some part thereof; but the interests, claims or liens of said defendants are, and each of them is, subject, subsequent and subordinate to the said mortgage lien of this cross-complainant.

XXII.

That numerous liens have been filed against the said irrigation system, lands, rights of way and water rights hereinbefore described, arising out of the construction of said irrigation system; that the amount of such liens and existing mortgages against the same aggregate, as this cross-complainant is informed and believes, upwards of $150,000.00, and the said Crane Creek Irrigation Land & Power Company is unable to pay or discharge the same; that in order to properly preserve, protect and maintain said lands, irrigation system, water rights, easements, rights and franchises appurtenant thereto and necessary for the use and operation thereof, and in order to protect this cross-complainant and other lien claimants having liens or mortgages on or against said property, rights and franchises, a Receiver should be appointed for all of said property, irrigation works, rights and franchises, with power to preserve, maintain and operate the same pending the foreclosure of this cross-complainant's mortgage and the liens that have been filed against said property, rights and franchises, as aforesaid, and with power

to pay the taxes levied and assessed against the same and other necessary outlays and disbursements.

XXIII.

That after the the execution of said note by the defendant Crane Creek Irrigation Land & Power Company, but before delivery thereof to this cross-complainant, the defendants E. D. Ford, A. G. Butterfield and R. C. McKinney, for value received, endorsed the same by writing their names across the back thereof, and waived in writing presentation, demand, protest and notice of non-payment; that by virtue of such endorsement the said E. D. Ford, A. G. Butterfield and R. C. McKinney each became and is liable for the payment of the full amount due this cross-complainant, as aforesaid.

XXIV.

This cross-complainant further shows that no proceedings at law have been had or instituted or any other suit or action commenced for or on behalf of this cross-complainant for the foreclosure of said mortgage or the collection of the amount due this cross-complainant, as aforesaid.

In Consideration Whereof, and forasmuch as this cross-complainant is remediless in the premises according to the strict course of the common law, and can only have relief in a court of equity, it prays the aid of this Honorable Court as follows:

(a) That this cross-complainant's said mortgage may be decreed a first and prior lien upon the lands and premises therein described, excepting the lands

released therefrom as hereinbefore stated, and upon the irrigation system, property, rights and franchises hereinbefore described, and the whole thereof; and that this cross-complainant may have a decree foreclosing its said mortgage, and judgment against the said defendant Crane Creek Irrigation Land & Power Company and the defendants E. D. Ford, A. G. Butterfield and R. C. McKinney, endorsers of said note, for the sum of $35,986.10, together with interest thereon at the rate of six per cent. (6%) per annum from the 27th day of December, 1913, and for the sum of $4,000.00 attorney's fee, and costs and disbursements herein.

(b) That the usual decree may be made for the sale of said premises hereinbefore described and embraced in said mortgage, according to law and the practice of this Honorable Court, and that the said irrigation system and the water rights appurtenant thereto may be sold as an entirety or whole and without redemption, to satisfy the amount due this cross-complainant, as aforesaid; and that in case of such sale the said defendants, and each and all of them, and all persons claiming by, through, or under them, or either of them, may be forever barred and foreclosed of and from all equity of redemption, and all claim of, in and to the said irrigation system, lands, rights of way, water rights, rights and franchises, and every part thereof, and that the purchaser thereof be let into the immediate possession of said premises, irrigation works, rights and franchises so sold; and that in the event the proceeds of

such sale be insufficient to satisfy and discharge the amount due this cross-complainant, as aforesaid, together with interest, costs of suit, and attorney's fees herein, this cross-complainant may have judgment for such deficiency against the defendant Crane Creek Irrigation Land & Power Company and the defendants E. D. Ford, A. G. Butterfield and R. C. McKinney, and execution therefor.

(c) That a Receiver be appointed for the lands, irrigation works, water rights and property embraced in this cross-complainant's said mortgage and hereinbefore described, with full power and authority in said Receiver to take immediate possession and control thereof and to preserve, protect, maintain and operate the same under the direction of this Honorable Court, and in such manner as may be deemed necessary from time to time under the circumstances of the case.

(d) That this cross-complainant may have such other and further relief in the premises as the nature of the case may require, and as shall be proper and agreeable to the principles of equity and to this Court.

And it may please your Honors to grant unto this cross-complainant a writ or writs of subpoena and other process, directed to the Marshal of said district, commanding him to summon the defendants hereinbefore named, and each and every of them, to be and appear in this Court on a certain day therein named, and under a certain penalty, therein to be limited and stated, and then and there, singly and severally, to make true and direct answer to this

cross-bill (but not under oath, such answer under oath being expressly waived as to each of said defendants), and to show cause, if any they have, why the prayer of this cross-bill should not be granted according to the rules and practices of this Honorable Court, and to stand ready to perform and abide by such order, direction or decree as may be made against them in the premises, and as to your Honorable Court shall seem meet.

And this your cross-complainant will ever pray, etc.

MANEY BROTHERS & CO.,
By RICHARDS & HAGA,
Its Solicitors.
J. H. RICHARDS,
O. O. HAGA,
McKEEN F. MORROW,
Counsel for Cross-Complainant, Maney Brothers & Co.,
Residence: Boise, Idaho.

United States of America,
District of Idaho,
County of Ada,—ss.

E. J. Wells, being first duly sworn, upon his oath deposes and says: That he is a member of the firm of Maney Brothers & Co., the cross-complainant in the foregoing cross-bill, and that he makes this affidavit and verification for and on behalf of the said cross-complainant; that he has read the foregoing cross-bill and knows the contents thereof, and that he believes the facts therein stated to be true.

E. J. WELLS.

Subscribed and sworn to before me this 29th day of December, 1914.

(Seal) EDNA L. HICE,
Notary Public in and for Ada County, Idaho.

EXHIBIT "A."

MORTGAGE.

This Indenture, made and entered into this 29th day of September, 1911, between the Crane Creek Irrigation Land & Power Company, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal place of business at Weiser, Idaho, (hereinafter sometimes called the mortgagor), the party of the first part, and Maney Bros. & Co., (a co-partnership consisting of J. W. Maney, residing at Oklahoma City, Okla., John Maney, residing at El Reno, Okla., and Herbert G. Wells and E. J. Wells, both residing at Boise, Idaho,) the parties of the second part, (hereinafter sometimes called the mortgagees).

Witnesseth: That the mortgagor for and in consideration of the sum of Eighty-seven Thousand Dollars, ($87,000.00), lawful money of the United States, to it in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed, assigned, transferred and set over, and by these presents does grant, bargain, sell, convey, assign, transfer and set over unto the said parties of the second part, and to their heirs, executors, administrators and assigns

forever, all property (whether real, personal or mixed) which the said mortgagor now has or may hereafter acquire, and particularly the following described property, to-wit:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford, on the 3rd day of September, 1907, which said application was approved by Thos. Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; which said reservoir, as shown by said map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred and seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir is situated in the Southeast Quarter (SE¼) of the Southeast Quarter (SE¼) of Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the Government of the United States.

(b) All canals, ditches, head-gates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used, or required in connection with the distribution of the water from said reservoir, and for carrying and distributing said water to the place or places of intended use, now owned or constructed, or which may hereafter be acquired or con-

structed by the mortgagor, with the rights of way therefor.

(c) All water rights and rights to the use of water in connection with the reservoir and irrigation works hereinbefore described, now owned, or that may hereafter be acquired, by the mortgagor, and particularly including the following permits issued by the State Engineer of the State of Idaho, all of which said permits are now owned and held by the mortgagor, said permits being issued on the dates and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sept. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sept. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

(d) The lands, described as follows:

The SE¼ of Sec. 5.

E½ of the SE¼, and the SW¼ of the SE¼ of Sec. 10

NE¼ of the NE¼ of Sec. 15

E½ of the NE¼ of Sec. 10

N½ of the SE¼ of Sec. 17

E½ of the NW¼ of Sec. 17

SE¼ of the SW¼ of Sec. 8

SE¼ of the NW¼, and the E½ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 14
NW¼ of the NW¼ of Sec. 8
NW¼ of the NE¼, and the N½ of the NW¼, and the SW¼ of the NW¼ of Sec. 12
Lot No. 4, and the SE¼ of the SW¼ of Sec. 7,
All in Township Ten (10) North, Range Four (4) West, B. M.
The SW¼ of Sec. 27
N½ of the NE¼, and the SE¼ of the NE¼, and the NE¼ of the SE¼ of Sec. 13
All in Township Eleven (11) North, Range Four (4) West, B. M.
And the E½ of the SE¼ of Sec. 12, Township Ten (10) North, Range Five (5) West, B. M., containing 1440 acres, more or less.

Also the following described lands, the legal title to which now stands in the State of Idaho, but certificates for the purchase of which are held by the said mortgagor, to-wit:

The NE¼ of the NW¼ of Sec. 9
NW¼ of the NE¼ of Sec. 9
NE¼ of the SW¼ of Sec. 9
NW¼ of the SW¼ of Sec. 9
SW¼ of the SW¼ of Sec. 9
SW¼ of the SW¼ of Sec. 4
SE¼ of the SW¼ of Sec. 4
SW¼ of the SE¼ of Sec. 4
SE¼ of the NW¼ of Sec. 7
NE¼ of the SE¼ of Sec. 8

NW¼ of the SE¼ of Sec. 8
SW¼ of the NE¼ of Sec. 9
SE¼ of the NW¼ of Sec. 9
NW¼ of the SE¼ of Sec. 9
SW¼ of the NE¼ of Sec. 10
NE¼ of the NW¼ of Sec. 10
All in Township Ten (10) North, Range Four (4) West, B. M.

The NW¼ of the NE¼ of Sec. 33
SW¼ of the NE¼ of Sec. 33
NE¼ of the NW¼ of Sec. 33
NW¼ of the NW¼ of Sec. 33
SW¼ of the NW¼ of Sec. 33
SE¼ of the NW¼ of Sec. 33
NE¼ of the SW¼ of Sec. 33
NW¼ of the SW¼ of Sec. 33
All in Township Eleven (11) North, Range Four (4) West, B. M.

The SE¼ of the SW¼ of Sec. 2, Township Ten (10) North, Range Five (5) West, B. M.

The NE¼ of the NE¼ of Sec. 10
SW¼ of the NE¼ of Sec. 10
SE¼ of the NE¼ of Sec. 10
NE¼ of the SE¼ of Sec. 10
NW¼ of the SE¼ of Sec. 10
SW¼ of the SE¼ of Sec. 10
SE¼ of the SE¼ of Sec. 10
NW¼ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 13
NW¼ of the NW¼ of Sec. 13
NE¼ of the NE¼ of Sec. 14

NE¼ of the NE¼ of Sec. 15
NW¼ of the NE¼ of Sec. 15
SW¼ of the NE¼ of Sec. 15
All in Township Eleven (11) North, Range Six (6) West, B. M.
The SW¼ of the SW¼ of Sec. 36
SW¼ of the SE¼ of Sec. 36
SE¼ of the SE¼ of Sec. 36
NE¼ of the SE¼ of Sec. 36
NW¼ of the SE¼ of Sec. 36
All in Township Eleven (11) North, Range Five (5) West, B. M., containing 1760 acres, more or less.

To Have and to Hold all and singular the above described real, personal and mixed property, and the rights, franchises, contracts, mortgages, notes, bonds, water rights and permits, rights of way, reservoirs, dams, canals, flumes, pipe lines, ditches and other structures forming a part of said irrigation system now owned by the mortgagor, or hereafter constructed or acquired by the mortgagor, with all the easements, rights of way, privileges, and appurtenances thereunto belonging, or in anywise appertaining.

This grant is intended as a mortgage to secure the payment of a certain promissory note of even date herewith executed and delivered by the said mortgagor unto the said mortgagees, a copy of which said note is in words and figures following, to-wit:

$87,000.00 Weiser, Idaho, September 29, 1911.

For Value Received, The Crane Creek Irrigation Land & Power Company, a corporation, promises to pay to the order of Maney Bros. & Co., at the Boise City National Bank at Boise, Idaho, on the 15th day of November, 1912, the sum of Eighty-seven Thousand Dollars ($87,000.00), in lawful money of the United States, with interest thereon at the rate of six per cent. (6%) per annum from November 15th, 1911.

In case suit or action be instituted for the collection of this note, or any portion thereof, the undersigned agrees to pay in addition to costs and disbursements allowed by statute, such sum as the Court may adjudge reasonable as attorneys' fees in said suit or action.

CRANE CREEK IRRIGATION LAND
& POWER COMPANY,

(Corporate Seal) By E. D. Ford, President.

Attest: E. P. Hall, Secretary.

Together with any and all other indebtedness to the mortgagees, whether evidenced by note or notes, or otherwise, of the mortgagor, and together with any sum or sums, which the mortgagees, or either of them, may pay or deem it necessary to pay in order to protect the said property, or any part thereof, or any rights of the mortgagor or of the mortgagees therein because of any prior lien or claim, or other charge against the same, whether heretofore or hereafter created.

And these presents shall be void if payment be made by the said mortgagor, its successors or as-

signs, of the said note when due, and of all other sums due or to become due, the mortgagees from the mortgagor, or which the mortgagees, or either of them, may have advanced or paid, with interest thereon as herein provided. But in case default shall be made in the payment of said sums of money, or any part thereof, when the same become due and should or ought to be paid, then and from thenceforth it shall be optional with the said mortgagees, their or either of their executors, administrators or assigns, to enter into and upon all and singular the above described premises and to sell and dispose of the same and of all benefit and equity of redemption of the mortgagor, its successors or assigns, according to law. And, out of the money arising from such sale, to retain the amount due the mortgagees, together with the costs and charges of foreclosure suit, including reasonable counsel fees, and also the amounts of all such payments for taxes, assessments, or encumbrances which the mortgagees, or either of them, may have paid in order to protect said property against other liens, charges and encumbrances, with the interest thereon at the rate of eight per cent. (8%) per annum, rendering the over-plus, if any there should be, unto the said mortgagor, its successors or assigns.

And the said mortgagor hereby further covenants, promises and agrees to and with the mortgagees, to pay and discharge at maturity all taxes, assessments, liens, or other encumbrances now subsisting, or hereafter to be laid or imposed upon said premises, or which may be in effect a prior charge thereupon to

these presents, during the continuance hereof, and in default thereof, the mortgagees may, at their option, pay and discharge the same; but all sums so paid by the mortgagees shall bear interest as aforesaid at the rate of eight per cent. (8%) per annum until paid, and shall, as aforesaid, be considered as secured by these presents and be a lien upon said property, premises, rights and franchises, and shall be deducted from the proceeds of the sale thereof, as above stated, with interest as aforesaid.

And the parties hereto expressly agree as follows:

1. The mortgagor shall have the right to carry out its contract with what is known as the Sunnyside Irrigation District, which contract bears date of August 22nd, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Sunnyside Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as Trustee, Seventy-five Thousand Dollars ($75,000.00) par value of the legally issued bonds of said irrigation district, the legality of which said bonds shall first have been approved by the Supreme Court of the State of Idaho. But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Sunnyside Irrigation District.

2. The mortgagor shall likewise have the right to carry out its contract with what is known as the Crane Creek Irrigation District, which contract bears date of August 22nd, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Crane Creek Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank of Boise, Idaho, as Trustee, Fifty Thousand Dollars ($50,000.00) par value, of the legally issued bonds of said irrigation district, the legality of which said bonds shall have first been approved by the Supreme Court of the State of Idaho. But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Crane Creek Irrigation District.

3. The mortgagor having heretofore contracted to sell to the Weiser Irrigation District fifteen thousand (15,000) acre feet of water in its said reservoir, it is hereby mutually agreed that this indenture shall not be a lien or encumbrance on the interest to be conveyed by the mortgagor to said Weiser Irrigation District, but such interest, to-wit: an interest in said reservoir and irrigation system and the water rights appurtenant thereto sufficient to give said Weiser Irrigation District fifteen thousand (15,000) acre feet of water in said reservoir, shall be unaffected by

the lien hereof, in the event such interest be accepted or taken over by said Weiser Irrigation District; and in lieu thereof the mortgagor hereby expressly agrees to deposit with said trustee, as additional security for the indebtedness secured hereby, as soon as the same can be delivered or so turned over under the terms of the contract between the mortgagor and said Weiser Irrigation District, the entire consideration to be received by the mortgagor from said Weiser Irrigation District for said interest in said reservoir and irrigation system, which consideration it is agreed shall be Seventy-five Thousand Dollars, ($75,000.00) par value, of the legally issued bonds of said District. And it is further stipulated and agreed that in the event said Weiser Irrigation District should fail to authorize the issuance of said bonds for said purpose, or should fail to carry out its said contract with the mortgagor for the purchase of said water and interest, then and in that event, the lien of this indenture shall attach to the interest and water so intended to be conveyed to said Weiser Irrigation District.

4. The mortgagees agree that the mortgagor may sell water rights and interest in its said irrigation system for the irrigation of lands situated thereunder in addition to the rights which it is hereby authorized to contract or sell to the irrigation districts above mentioned. But in the case of each and every such sale it shall pay to the mortgagees Five Dollars ($5.00) for each acre foot of water sold in said system; such payment shall be immediately credited upon the indebtedness due the mortgagees hereunder.

But in the event such water rights or interest be sold on time and security be taken therefore, (and security shall be taken in every case where the same are sold on time), then such security to the amount of Five Dollars ($5.00) per acre foot shall be deposited with the said trustee, and held as hereinafter provided. But the mortgagor may, at its option, in lieu of depositing the consideration received for the sale of said water rights or interest, pay to the mortgagees Five Dollars ($5.00) per acre foot, as aforesaid, for such water rights or interest, and upon such payment being made, or security deposited, as aforesaid, the mortgagees will execute a release of this indenture in so far as it affects the interest or water rights sold.

5. The mortgagor may in the usual course of business and at the reasonable market value, sell any of the lands above described, excepting what may be required for rights of way for the reservoir, canals, or other parts of the irrigation system, and may pay the usual commissions for effecting such sales, taxes and liens prior to this indenture; but the balance of the proceeds from said sales and the whole thereof, if paid in cash, shall immediately be turned over to the mortgagees and applied on the indebtedness secured hereby; and if such balance be not paid in cash it shall be properly secured and the note, mortgage or contract deposited with the trustee, to be by the trustee held and sold as herein provided. Upon such sales being made the mortgagees will as and when requested execute necessary releases releasing the property sold from the lien of this indenture.

6. The mortgagor shall have the right to extend until January 1st, 1913, present or existing mortgages or liens without waiver of priority of the lien of such mortgage over this indenture.

7. The mortgagor shall have the right to sell the bonds deposited with the trustee of the Crane Creek Irrigation District and of the Sunnyside Irrigation District, or any part thereof, at not less than seventy-five per cent. (75%) of their par value, and the trustee is hereby authorized to deliver to the mortgagor, or any of its officers, any of said District bonds upon receipt of seventy-five per cent. (75%) of the par value thereof; and the money so received shall be turned over to the mortgagees and applied upon the indebtedness secured hereby. But none of the bonds of the Weiser Irrigation District shall be sold at less than ninety per cent. (90%) of their par value.

8. In the event the said F. F. Johnson, the Trustee herein named, should for any reason cease to be an officer of the Boise City National Bank, then the trusts, powers and authority by this indenture conferred upon said F. F. Johnson shall vest in and be exercised by the cashier of said Boise City National Bank; and no assignment or other instrument shall be required to transfer from said F. F. Johnson, in the event he ceases to be an officer of said bank, to the cashier of said bank the trusts, powers and authority hereby conferred upon said trustee.

9. Upon default in the payment of the indebtedness secured hereby, and upon the failure of the mortgagor to pay the same according to the terms hereof,

the trustee above named shall upon the request of the mortgagees, or either of them, sell all security, including the bonds aforesaid, which may have been deposited with him, according to the laws of the State of Idaho for the sale of pledged property. And the proceeds of such sale, less the expenses of sale and the charges of the trustees, including reasonable attorneys' fees to be determined by the trustee, shall be paid to the mortgagees and credited upon the indebtedness secured hereby; and thereupon this indenture may be foreclosed by the mortgagees according to its terms, and in the manner provided by the laws of the State of Idaho.

10. The mortgagor shall endorse over or assign to the trustee all notes, mortgages, contracts or other instruments required to be deposited with the trustee hereunder, so that, in the event of a sale thereof under the power of sale herein given the trustee, title thereto may be given the purchaser at such sale. And the contracts which the mortgagor has with the irrigation districts herein mentioned, and all extensions thereof and amendments thereto that may hereafter be made, are hereby assigned to the mortgagees hereunder as security for the indebtedness secured hereby. The trustee may take all necessary action in his own name, or otherwise, to enforce the payment and collection of notes, contracts and mortgages and other evidence of indebtedness deposited with him hereunder.

11. It is hereby expressly agreed and stipulated between the parties hereto that both partial and full

releases of the lien created by this indenture upon any of the property herein described or referred to may be executed by any of the said mortgagees, and each of said mortgagees is hereby expressly given full power and authority to act for all of said mortgagees in the execution and delivery of such releases, and any release or satisfaction hereof, either in whole or in part, executed by any one of said mortgagees shall be as binding and effective as if executed by all the members of said co-partnership of Maney Bros. & Co.

The execution of this indenture by the mortgagor has been authorized by the Board of Directors of said mortgagor at a meeting thereof this day legally called and held.

In Witness Whereof, the said Crane Creek Irrigation Land & Power Company has caused its name to be hereunto subscribed by its President, and its corporate seal affixed, attested by its Secretary; and the said Maney Bros. & Co. have caused their firm name to be hereunto subscribed by a member of said firm, in duplicate, the day and year first above written.

CRANE CREEK IRRIGATION LAND
& POWER COMPANY,
By E. D. Ford, President.

Attest: E. P. Hall, Secretary.

MANEY BROS. & CO.,
By H. G. Wells.

State of Idaho,
County of Washington,—ss.

On this 29th day of September in the year 1911,

before me, B. S. Varian, a Notary Public in and for said County and State, personally appeared E. D. Ford, known to me to be the President of the Crane Creek Irrigation Land & Power Company, the corporation which executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate written.

My commission expires the 22nd day of June, 1915.

(Seal) (Signed) B. S. VARIAN.

State of Idaho,
County of Washington,—ss.

E. D. Ford, being first duly sworn, deposes and says: That he is the President of the Crane Creek Irrigation Land & Power Company, the corporation who executed the foregoing mortgage; that such corporation executed the same as mortgagor and for the uses and purposes therein set forth; that said mortgage was made and executed by said corporation in good faith and without any design or intent to hinder, delay or defraud the creditors of said corporation.

(Signed) E. D. FORD.

Subscribed and Sworn to before me this 29th day of September, 1911.

(Seal) B. S. Varian, Notary Public.

Cross-bill filed December 29, 1914.

(Title of Court and Cause.)

Answer of Crane Creek Irrigation Land & Power Company, a Corporation, and E. D. Ford, A. C. Butterfield and R. C. McKinney, defendants above named, to the Cross-Bill of Maney Brothers and Company, a co-partnership, not waiving but reserving and insisting upon the said defendants' motion to dismiss the said cross-bill heretofore filed and now Pending in this Court.

I.

The said defendants admit that the Crane Creek Irrigation Land and Power Company, Crane Creek Irrigation District, Sunnyside Irrigation District, The Idaho National Bank, Slick Brothers Construction Company, Limited, are corporations organized and existing under the laws of the State of Idaho, and are citizens respectively thereof; that the C. R. Shaw Wholesale Company is a corporation organized and existing under the laws of the State of Nevada and is a citizen thereof; that the Utah Fire Clay Company is a corporation organized and existing under the laws of the State of Utah and a citizen thereof; that the Portland Wood Pipe Company is a corporation organized and existing under the laws of the State of Oregon and a citizen thereof; that the defendants, Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Begley, James M. Magee, C. A. Smith, J. L. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, A. L. Chenoweth, Geo. C. Cater, J. C. Toney, Thomas Sherry, E. H.

Hasbrouch, E. D. Ford, A. G. Butterfield and R. C. McKinney are residents and citizens of the State of Idaho; that the defendant, L. F. Easton, is a resident and citizen of the State of Wisconsin; that the defendant, G. A. Heman, is a resident and citizen of the State of Missouri.

II.

These defendants admit that the cross-complainant, Maney Brothers and Company, is a co-partnership consisting of J. W. Maney and John Maney, each a citizen and resident of the State of Oklahoma, and Herbert G. Wells and E. J. Wells, each a citizen and resident of the State of Idaho.

III.

Admit that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

IV.

Admit that the bill of complaint of the plaintiff, Portland Wood Pipe Company, is brought to foreclose a pretended mechanic's lien alleged to cover an irrigation system, reservoir, water rights and water appropriations, and the rights of way therefor, constructed by the Crane Creek Irrigation Land and Power Company, but deny that it is as a whole the identical irrigation system described in this cross-complainant's mortgage by this cross-bill sought to be foreclosed, and allege that only a part of said system is so included in and described in said mortgage.

V.

Admit that on the 29th day of September, 1911, the Crane Creek Irrigation Land and Power Company, for a valuable consideration, made and delivered to the cross-complainant herein its promissory note as in the words and figures and for the sum, as set out in said cross-bill in paragraph XIII.

VI.

Admit that to secure the payment of said note the said Crane Creek Irrigation Land and Power Company on the same day made and delivered to the cross-complainant herein a mortgage, whereby it mortgaged, or attempted to mortgage, to said cross-complainant, the following described property, situate in Washington County, Idaho, to-wit:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford, on the 3rd day of September, 1907, which said application was approved by Thos. Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; which said reservoir, as shown by said map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred and seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir is situated in the Southeast Quarter (SE¼) of the

Southeast Quarter (SE¼) of Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the Government of the United States.

(b) All canals, ditches, headgates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used, or required in connection with the distribution of the water from said reservoir, and for carrying and distributing said water to the place or places of intended use, now owned or constructed, or which may hereafter be acquired or constructed by the said Crane Creek Irrigation Land & Power Company, with the rights of way therefor.

(c) All water rights and rights to the use of water in connection with the reservoir and irrigation works hereinbefore described, now owned, or that may hereafter be acquired, by said Crane Creek Irrigation Land & Power Company, and particularly including the following permits issued by the State Engineer of the State of Idaho, all of which permits are now owned and held by the Crane Creek Irrigation Land & Power Company, said permits being issued on the dates and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

(d) The lands described as follows, excluding from such description the lands subsequently released, as set forth in cross-complainant's cross-bill, to-wit:

The SE¼ of Sec. 5
E½ of the SE¼, and the SW¼ of the SE¼ of Sec. 10
NE¼ of the NE¼ of Sec. 15
E½ of the NE¼ of Sec. 10
N½ of the SE¼ of Sec. 17
E½ of the NW¼ of Sec. 17
SE¼ of the SW¼ of Sec. 8
SE¼ of the NW¼, and the E½ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 14
NW¼ of the NE¼, and the N½ of the NW¼, and the SW¼ of the NW¼ of Sec. 12
Lot 4, and the SE¼ of the SW¼ of Sec. 7
All in Township Ten (10) North, Range Four (4) West B. M.
And the E½ of the SE¼ of Sec. 12, Township Ten North Range 5 West, B. M.

All of said lands being patented and situate within the boundaries of the Sunnyside Irrigation District.

The SW¼ of Sec. 27

N½ of the NE¼, and the SE¼ of the NE¼, and the NE¼ of the SE¼ of Sec. 13.

All in Township 11 North, Range 4 West, B. M.

And all patented, and situate within the boundaries of the Crane Creek Irrigation District.

Also, the following described lands, the legal title to which is vested in the State of Idaho, but certificates for the purchase of which, under the laws of the State, are, and at the time of the execution and delivery of the said mortgage were, held by the said Crane Creek Irrigation Land and Power Company, to-wit:

The NE¼ of the SW¼ of Sec. 9

NW¼ of the SW¼ of Sec. 9

SW¼ of the SW¼ of Sec. 9

SE¼ of the NW¼ of Sec. 7

NE¼ of the SE¼ of Sec. 8

NW¼ of the SE¼ of Sec. 8

NW¼ of the SE¼ of Sec. 9

SW¼ of the NE¼ of Sec. 10

NE¼ of the NW¼ of Sec. 10

All being State lands and situate within the boundaries of the Sunnyside Irrigation District, in Township 10 North, Range 4 West, B. M.

The NW¼ of the NE¼ of Sec. 33

SW¼ of the NE¼ of Sec. 33

NE¼ of the NW¼ of Sec. 33

NW¼ of the NW¼ of Sec. 33

SW¼ of the NW¼ of Sec. 33

SE¼ of the NW¼ of Sec. 33

NE¼ of the SW¼ of Sec. 33
NW¼ of the SW¼ of Sec. 33

All in Township 11 North, Range 4 West, B. M., and situate within the boundaries of the Crane Creek Irrigation District.

And the SE¼ of the SW¼ of Sec. 2, Township 10 North, Range 5 West, B. M.

All within the boundaries of the Sunnyside Irrigation District.

And the NE¼ of the NE¼ of Sec. 10
SW¼ of the NE¼ of Sec. 10
SE¼ of the NE¼ of Sec. 10
NE¼ of the SE¼ of Sec. 10
NW¼ of the SE¼ of Sec. 10
SW¼ of the SE¼ of Sec. 10
SE¼ of the SE¼ of Sec. 10
NW¼ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 13
NW¼ of the NW¼ of Sec. 13
NE¼ of the NE¼ of Sec. 14
NE¼ of the NE¼ of Sec. 15
NW¼ of the NE¼ of Sec. 15
SW¼ of the NE¼ of Sec. 15

All in Township 11 North, Range 6 West, B. M., and State lands and situate outside of the boundaries of the Sunnyside and Crane Creek Irrigation Districts.

And SW¼ of the SW¼ of Sec. 36
SW¼ of the SE¼ of Sec. 36
SE¼ of the SE¼ of Sec. 36
NE¼ of the SE¼ of Sec. 36
NW¼ of the SE¼ of Sec. 36

All in Township 11 North, Range 5 West, B. M., and all State lands and situate outside of the boundaries of the Sunnyside and Crane Creek Irrigation Districts; together with all rights of way, reservoirs, dams, canals, flumes, pipe lines, ditches and other structures forming a part of said irrigation system, whether then owned by the said Crane Creek Irrigation Land and Power Company, or thereafter constructed or acquired by said Company, with all the easements, rights of way, privileges and appurtenances thereunto belonging or in anywise appertaining, as appears by an alleged copy of said mortgage attached to said cross-bill as Exhibit "A" and made a part thereof.

VII.

That said defendants admit that said mortgage was acknowledged, certified and recorded on the 6th day of October, A. D. 1911, in Book 15 of Mortgages, beginning with page 403.

VIII.

Admit the allegations of paragraph XVI in said cross-bill, as therein made, and that at the time of filing said cross-bill there was a balance due the said cross-complainant aforesaid of Thirty-five Thousand Nine Hundred Eighty-six and Ten One-hundredths ($35,986.10) Dollars, with interest thereon from the 27th day of December, 1913, at six per centum per annum.

IX.

Admit the default of the Crane Creek Irrigation Land and Power Company in the payment of taxes

and other payments required to be paid, and all allegations made in paragraph XVII of said cross-bill.

X.

Admit all the allegations made in paragraph XVIII of said cross-bill, and particularly that since the delivery of said mortgage the cross-complainant has released from the alleged lien of the said mortgage, the lands, premises and property in said paragraph particularly described.

XI.

Admit the allegations as specifically made in paragraph XIX of the cross-bill.

XII.

Defendants admit that the note and mortgage, hereinbefore mentioned, provide for the payment by the Crane Creek Irrigation Land and Power Company of a reasonable attorney's fee, if suit should be instituted for the collection or foreclosure thereof.

XIII.

Admit the allegations of paragraph XXI of said cross-bill, as therein specifically stated and set forth, except that defendants, upon their information and belief, allege: That the cross-complainant herein is not entitled to, and has no mortgage lien upon, the property of the defendants, Crane Creek Irrigation District and Sunnyside Irrigation District, as in said mortgage and cross-bill asserted.

XIV.

Admit that numerous pretended claims of lien have been filed against the said irrigation system,

lands, rights of way and water rights, arising out of and connected with the construction of the said irrigation system, and that the amount of such liens as claimed is upwards of One Hundred Fifty Thousand Dollars ($150,000.00). Admit the allegations in said cross-bill made that the said Crane Creek Irrigation Land and Power Company is unable to pay or discharge the said indebtedness; but deny that, in order to properly preserve, protect or maintain the said lands, system, water rights and franchises necessary for the use and operation thereof, or to protect the said cross-complainant, or other pretended lien claimants, a receiver is necessary or that a receiver should be appointed; and deny that the said cross-bill states sufficient facts to authorize the appointment of a receiver.

XV.

Admit that after the execution of said note by the Crane Creek Irrigation Land and Power Company, the individual defendants, E. D. Ford, A. G. Butterfield and R. C. McKinney, endorsed the said note in writing and waived presentation, demand, protest and notice of non-payment; but deny that the said endorsements were made or given for valuable or any other consideration.

XVI.

These defendants admit that no proceedings of law have been instituted or any other suit or action commenced by or on behalf of the cross-complainant herein, for the foreclosure of its said mortgage or the collection of the amount due cross-complainant.

XVII.

And further answering, these defendants allege: That, as they are informed and verily believe, the Court here has not jurisdiction of the matters and things set forth in the cross-bill of the said cross-complainant herein; and that the controversy herein is solely between citizens of the State of Idaho and not otherwise; and that said cross-bill should be dismissed.

WHEREFORE, having fully answered, these defendants pray that the cross-bill of the cross-complainant herein, Maney Brothers and Company, a co-partnership, be dismissed finally out of the Court.

CRANE CREEK IRRIGATION LAND AND POWER COMPANY,
By E. D. Ford, President.
E. D. FORD,
A. G. BUTTERFIELD,
R. C. McKINNEY,
By B. S. VARIAN,
Residence, Weiser, Idaho,
Solicitor.

(Title of Court and Cause.)

Answer of the Sunnyside Irrigation District, a corporation, defendant above-named, to the Cross-Bill of Maney Brothers and Company, a co-partnership, not waiving but reserving and insisting upon the said defendant's motion to dismiss the said Cross-Bill heretofore filed and now pending in this Court.

I.

The said defendant admits that the Crane Creek Irrigation Land and Power Company, Crane Creek Irrigation District, Sunnyside Irrigation District, The Idaho National Bank, Slick Brothers Construction Company, Limited, are corporations organized and existing under the laws of the State of Idaho, and are citizens respectively thereof; that the C. R. Shaw Wholesale Company is a corporation organized and existing under the laws of the State of Nevada and is a citizen thereof; that the Utah Fire Clay Company is a corporation organized and existing under the laws of the State of Utah, and a citizen thereof; that the Portland Wood Pipe Company is a corporation organized and existing under the laws of the State of Oregon, and a citizen thereof; that the defendants, Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Begley, James M. Magee, C. A. Smith, J. L. Smith, Geo. F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, A. L. Chenoweth, George C. Cater, J. C. Toney, Thomas Sherry, E. H. Hasbrouch, E. D. Ford, A. G. Butterfield and R. C. McKinney are residents and citizens of the State of Idaho; that the defendant L. F. Easton is a resident and citizen of the State of Wisconsin; that the defendant G. A. Heman is a resident and citizen of the State of Missouri.

II.

This defendant admits that the cross-complainant, Maney Brothers & Company, is a co-partnership con-

sisting of J. W. Maney and John Maney, each a citizen and resident of the State of Oklahoma, and Herbert G. Wells and E. J. Wells, each a citizen and resident of the State of Idaho.

III.

Admits that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

IV.

Admits that the bill of complaint of the plaintiff, Portland Wood Pipe Company, is brought to foreclose a pretended mechanic's lien alleged to cover an irrigation system, reservoir, water rights and water appropriations and the rights of way therefor, constructed by the Crane Creek Irrigation Land and Power Company, but denies that it is as a whole the identical irrigation system described in this cross-complainant's mortgage by this cross-bill sought to be foreclosed, and alleges that only a part of said system is so included in and described in said mortgage.

V.

Admits that on the 29th day of September, 1911, the Crane Creek Irrigation Land and Power Company for a valuable consideration made and delivered to the cross-complainant herein its promissory note as in words and figures and for the sum as set out in said cross-bill in paragraph XIII.

VI.

Admits that to secure the payment of said note the

said Crane Creek Irrigation Land and Power Company on the same day made and delivered to the cross-complainant herein a mortgage whereby it mortgaged or attempted to mortgage to said cross-complainant, the following described property, situate in Washington County, Idaho, to-wit:

(a) A certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West of the Boise Meridian, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford, on the 3rd day of September, 1907, which said application was approved by Thomas Ryan, Acting Secreetary of the Interior, on the 26th day of October, 1907, which said reservoir, as shown by the map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred and seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir (is intended) is situated in the Southeast (SE) quarter of the Southeast (SE) quarter of Section 19 of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the Government of the United States.

(b) All canals, ditches, headgates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used, or required in connection with the distribution of the water from said reservoir, and for carrying and distributing said water

to the places of intended use, now owned or constructed, or which may hereafter be acquired or constructed by the said Crane Creek Irrigation Land and Power Company, with the rights of way therefor.

(c) All water rights and rights to the use of water in connection with the reservoir and irrigation works hereinbefore described, now owned, or that may hereafter be acquired, by said Crane Creek Irrigation Land and Power Company, and particularly including the following permits issued by the State Engineer of the State of Idaho, said permits being issued on the dates and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

(d) The lands described as follows, excluding from such description the lands subsequently released as set forth in cross-complainant's cross-bill, to-wit:

The SE¼ of Sec. 5

E½ of the SE¼, and the SW¼ of the SE¼ of Sec. 10

NE¼ of the NE¼ of Sec. 15
E½ of the NE¼ of Sec. 10
N½ of the SE¼ of Sec. 17
E½ of the NW¼ of Sec. 17
SE¼ of the SW¼ of Sec. 8
SE¼ of the NW¼, and the E½ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 14
NW¼ of the NE¼, and the N½ of the NW¼, and the SW¼ of the NW¼ of Sec. 12
Lot No. 4, and the SE¼ of the SW¼ of Sec. 7
All in Township Ten North, Range Four West, B. M.

And the E½ of the SE¼ of Sec. 12, Township Ten North, Range 5 West, B. M.

All of said lands being patented and situate within the boundaries of the Sunnyside Irrigation District.

The SW¼ of Sec. 27
N½ of the NE¼, and the SE¼ of the NE¼, and the NE¼ of the SE¼ of Sec. 13

All in Township 11 North, Range 4 West, B. M., and all patented and situate within the boundaries of the Crane Creek Irrigation District.

Also, the following described lands, the legal title to which is vested in the State of Idaho, but certificates for the purchase of which under the laws of the State, are and at the time of the execution and delivery of the said mortgage were, held by the said Crane Creek Irrigation Land and Power Company, to-wit:

The NE¼ of the SW¼ of Sec. 9
NW¼ of the SW¼ of Section 9
SW¼ of the SW¼ of Section 9
SE¼ of the NW¼ of Section 7
NE¼ of the SE¼ of Section 8
NW¼ of the SE¼ of Section 8
NW¼ of the SE¼ of Section 9
SW¼ of the NE¼ of Section 10
NE¼ of the NW¼ of Section 10

All being State lands and situate within the boundaries of the Sunnyside Irrigation District in Township 10 North of Range 4 West of the Boise Meridian.

The NW¼ of the NE¼ of Section 33
SW¼ of the NE¼ of Section 33
NE¼ of the NW¼ of Section 33
NW¼ of the NW¼ of Section 33
SW¼ of the NW¼ of Section 33
SE¼ of the NW¼ of Section 33
NE¼ of the SW¼ of Section 33
NW¼ of the SW¼ of Section 33

All in Township 11 North of Range 4 West of the Boise Meridian within the boundaries of the Crane Creek Irrigation District.

And the SE¼ of the SW¼ of Section 2, Township 10 North, Range 5 West of the Boise Meridian.

All within the boundaries of the Sunnyside Irrigation District.

And the NE¼ of the NE¼ of Section 10
SW¼ of the NE¼ of Section 10

SE¼ of the NE¼ of Section 10
NE¼ of the SE¼ of Section 10
NW¼ of the SE¼ of Section 10
SW¼ of the SE¼ of Section 10
SE¼ of the SE¼ of Section 10
NW¼ of the SW¼ of Section 11
NE¼ of the NW¼ of Section 13
NW¼ of the NW¼ of Section 13
NE¼ of the NE¼ of Section 14
NE¼ of the NE¼ of Section 15
NW¼ of the NE¼ of Section 15
SW¼ of the NE¼ of Section 15

All in Township 11 North of Range 6 West of the Boise Meridian and State lands situate outside of the boundaries of the Sunnyside and Crane Creek Irrigation Districts.

And SW¼ of the SW¼ of Section 36
SW¼ of the SE¼ of Section 36
SE¼ of the SE¼ of Section 36
NE¼ of the SE¼ of Section 36
NW¼ of the SE¼ of Section 36

All in Township 11 North of Range 5 West of the Boise Meridian and all State lands and situate outside of the boundaries of the Sunnyside and Crane Creek Irrigation Districts.

Together with all rights of way, reservoirs, dams, canals, flumes, pipe lines, ditches and other structures forming a part of said irrigation system, whether then owned by the said Crane Creek Irrigation Land and Power Company, or thereafter constructed or acquired by said Company, with all the ease-

ments, rights of way, privileges and appurtenances thereunto belonging or in anywise appertaining, as appears by an alleged copy of said mortgage attached to said cross-bill as "Exhibit A" and made a part thereof.

VII.

The said defendants admit that said mortgage was acknowledged, certified and recorded on the 6th day of October, A. D. 1911, in Book 15 of Mortgages, beginning with page 403.

VIII.

Admits the allegations of paragraph XVI in said cross-bill as therein made, and that at the time of filing said cross-bill there was a balance due the said cross-complainant aforesaid, of Thirty-five Thousand Nine Hundred Eighty-six and Ten One-hundredths ($35,986.10) Dollars, with interest thereon from the 27th day of December, 1913, at six per centum per annum.

IX.

Admit the default of the Crane Creek Irrigation Land and Power Company in the payment of taxes and other payments required to be paid, and all allegations made in paragraph XVII of said cross-complaint.

X.

Admits all the allegations made in paragraph XVIII of said cross-complaint and particularly that since the delivery of said mortgage the cross-complainant has released from the alleged lien of the

said mortgage, the lands, premises and property in said paragraph particularly described.

XI.

Admits the allegations as specifically made in paragraph XIX of the cross-complaint.

XII.

Admits that the mortgage aforesaid provides for the payment by the Crane Creek Irrigation Land and Power Company of a reasonable attorney's fee for foreclosing said mortgage or bringing suit thereon. Defendants admit that the note and mortgage hereinbefore mentioned provide for the payment by the Crane Creek Irrigation Land and Power Company of a reasonable attorney's fee if suit should be instituted for the collection or foreclosure thereof; and in this behalf defendants allege that cross-complainant is not entitled to attorney's fee, reasonable or otherwise, for the foreclosure of said mortgage; and deny that Four Thousand ($4,000.00) Dollars or any other sum is a reasonable attorney's fee for such foreclosure.

XIII.

Admits the allegations of paragraph XXI of said cross-bill as therein specifically stated and set forth, except that defendant, upon its information and belief, alleges: That the cross-complainant herein is not entitled to and has no mortgage lien upon the property of the defendant, Crane Creek Irrigation District, or of this defendant, as in said mortgage and cross-complaint asserted.

XIV.

Admits that numerous pretended claims of lien have been filed against the said irrigation system, lands, rights of way and water rights, arising out of and connected with the construction of the said irrigation system, and that the amount of such liens as claimed is upwards of One Hundred Fifty Thousand ($150,000.00) Dollars; but as to the allegations in said cross-complaint made that the said Crane Creek Irrigation Land and Power Company is unable to pay or discharge the said indebtedness, this defendant has not sufficient knowledge to enable it to admit or deny the same; and the said defendant denies, that in order to properly preserve, protect or maintain the said lands, system, water rights and franchises necessary for the use and operation thereof, and to protect the said cross-complainant and other pretended lien claimants, a Receiver should be appointed; and deny that a receivership is necessary or authorized by the facts in said cross-bill stated.

XV.

Admits that after the execution of said note by the Crane Creek Irrigation Land and Power Company, the individual defendants, E. D. Ford, A. G. Butterfield and R. C. McKinney, endorsed the said note in writing and waived presentation, demand, protest and notice of non-payment; but denies that the said endorsements were made or given for valuable or any other consideration.

XVI.

This defendant admits that no proceedings of law

have been instituted or any other suit or action commenced by or on behalf of the cross-complainant herein, for the foreclosure of its said mortgage or the collection of the amount due cross-complainant.

XVII.

Further answering the said cross-bill, the defendant, Sunnyside Irrigation District, alleges:

That it is, and during all the times hereinbefore and hereinafter mentioned was, a corporation organized and existing as an irrigation district under and by virtue of the laws of the State of Idaho and particularly under the provisions of Title 14, Revised Codes of Idaho, and the laws supplemental and amendatory thereof, for the purposes of supplying that portion of the public owning, occupying, using or cultivating lands within its boundaries, with water from the public streams and public unappropriated waters, for household, domestic and irrigation purposes, and the cultivation of lands; and that its irrigation system, works, reservoir site and water rights, as described in the cross-bill herein and in this answer, during all the times in said cross-bill and in this answer mentioned, were, and now are, dedicated to a public use, as aforesaid; that this defendant has hereinbefore issued its bonds at the par value of Five Hundred Thirty-seven Thousand Eight Hundred ($537,800.00) Dollars in the aggregate, which said bonds have been sold and distributed to numerous individuals and corporations in different states, and which said bonds are by force of the laws of the State of Idaho charged as a first lien upon this

defendant's irrigation system, works, water rights and reservoir site; that on the 25th day of June, A. D. 1909, the petition for the organization of this defendant as an irrigation district was filed with the Clerk of the Board of County Commissioners of the County of Washington, Idaho, signed by a majority of the holders of title and evidences of title to lands susceptible of one mode of irrigation from a common source and by the same system of works, and by the holders of title or evidences of title to more than one-fourth part of the total area of the lands in the proposed district assessable for the purposes of the district, and setting forth the proposed boundaries and describing with the degree of certainty required by law in a tax roll, all the lands proposed to be included in the district, and in all other particulars conforming to the requirements of the law; and that said petition was accompanied by a map of the proposed district showing the location of the proposed canal and other works, et cetera, and in all particulars complying with the statute in such case made and provided; and that thereafter such proceedings were had before the Board of County Commissioners of Washington County, Idaho, in which the said lands and property is situated, to-wit, on the 17th day of August, A. D. 1909, that the said Board of County Commissioners ordered an election to be held pursuant to law, and thereafter, to-wit, on the 20th day of September, 1909, an election was duly held in the said Sunnyside Irrigation District, defendant herein, and thereafter upon a canvass of the votes cast

at such election, the said Board of County Commissioners on the 25th day of September, A. D. 1909, duly found and determined that more than two-thirds of the votes cast at said election were cast in favor of the organization of the said district, and that the same was duly organized as the Sunnyside Irrigation District.

And said defendant further alleges:

That subsequently, to-wit, on the 31st day of August, A. D. 1911, a petition on behalf of said district was by its Board of Directors duly filed with the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Washington, praying for approval and confirmation of the proceedings theretofore had, and for the organization of said District, and thereafter, upon a hearing had as provided by law, the said District Court did on the 30th day of September, 1911, make and enter its decree approving and confirming all the proceedings, acts and things done and performed by the said Board of County Commissioners and the Board of Directors in the matter of the organization of said District and did adjudge each and every of them to be legal and valid; and that thereupon an appeal was taken from said decree of said Court to the Supreme Court of the State of Idaho, which said Court did on the second day of January, A. D. 1912, enter its final judgment affirming the judgment of the Court below.

And said defendant further alleges:

That after the organization of said defendant as

the Sunnyside Irrigation District, as aforesaid, to-wit, on the 29th day of September, A. D. 1911, Maney Brothers and Company, a co-partnership, cross-complainant herein, made and entered into a contract with the Crane Creek Irrigation Land and Power Company, which last-named company was an original contractor in the construction of the system, works and structures appertaining to the irrigation system of said defendant, whereby it agreed to furnish certain materials and perform certain labor in the matter of such construction for the said Crane Creek Irrigation Land and Power Company for approximately the sum of money mentioned in the note and mortgage set up and alleged by said cross-complainant in its cross-bill herein, and before any materials had been furnished or work performed, the said cross-complainant procured from the said Crane Creek Irrigation Land and Power Company the note and mortgage aforesaid; that said mortgage purported to include and create a lien upon the lands hereinbefore in this answer described as being within the boundaries of said defendant's district, theretofore and then dedicated to the public uses aforesaid, and contracted by the said Crane Creek Irrigation Land and Power Company to be conveyed to said defendant, Sunnyside Irrigation District; and that said mortgage purported to include and create a lien upon all the reservoirs, reservoir sites, canals, ditches, head gates, flumes, pipe lines, dams, laterals and other works and structures necessary and required for the public purposes aforesaid in the dis-

tribution of waters contemplated by the statutes in such cases made and provided, and also all the permits and privileges which had been contracted to be conveyed to said defendant, Sunnyside Irrigation District.

And said defendant further alleges:

That in all the premises the said cross-complainant as a co-partnership and the individual members thereof had actual knowledge and notice of the character of said lands and property and the dedication thereof to public uses, and of the contract made by the Crane Creek Irrigation Land and Power Company with said defendant.

In consideration of the premises said defendant alleges upon its information and belief that the said Crane Creek Irrigation Land and Power Company was not authorized in law to charge the property aforesaid, and as described in the said mortgage and cross-complaint herein, with the mortgage lien for the payment of the costs of construction as hereinbefore stated, and that the said cross-complainant herein, Maney Brothers and Company, a co-partnership, had no authority to so contract with the said Crane Creek Irrigation Land and Power Company, and that the said mortgage is not and can not be charged as a lien upon or against any of the lands and property therein described, which are situate within the boundaries of this defendant, Sunnyside Irrigation District, or which is necessarily connected with or required for the effected use and operation of its said system, and to that extent the same is null and void.

WHEREFORE, having fully answered said defendant prays that the pretended claim of mortgage lien asserted by the cross-complainant herein be denied; that cross-complainant take nothing by its said cross-bill against said defendant or its property; that the said cross-bill be dismissed as against said defendant; and that it have and recover its reasonable costs in this behalf lawfully incurred.

SUNNYSIDE IRRIGATION DISTRICT,
By August Brockman, President.
ED. R. COULTER, Weiser,
N. M. RUICK, Boise,
C. S. VARIAN, Salt Lake City, Utah,
Solicitors for Sunnyside Irrigation District.

Filed February 3rd, 1915.

(Title of Court and Cause.)

Answer of the Crane Creek Irrigation District, a corporation, above-named defendant, to the Cross-Bill of Maney Brothers and Company, a co-partnership, not waiving but reserving and insisting upon the said defendant's motion to dismiss the said Cross-Bill heretofore filed and now pending in this Court.

I.

The said defendant admits that the Crane Creek Irrigation Land and Power Company, Crane Creek Irrigation District, Sunnyside Irrigation District, The Idaho National Bank, Slick Brothers Construction Company, Limited, are corporations organized

and existing under the laws of the State of Idaho, and are citizens respectively thereof; that the C. R. Shaw Wholesale Company is a corporation organized and existing under the laws of the State of Nevada, and is a citizen thereof; that The Utah Fire Clay Company is a corporation organized and existing under the laws of the State of Utah, and a citizen thereof; that the Portland Wood Pipe Company is a corporation organized and existing under the laws of the State of Oregon, and a citizen thereof; that the defendant, Pete March, J. M. Pinckard, F. A. Squier, S. C. Comerford, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, H. H. Begley, James M. Magee, C. A. Smith, J. L. Smith, Geo. F. Smith, Claud F. Smith, Henry Whitmore, A. T. Schwab, A. L. Chenoweth, George C. Cater, J. C. Toney, Thomas Sherry, E. H. Hasbrouch, E. D. Ford, A. G. Butterfield and R. C. McKinney are residents and citizens of the State of Idaho; that the defendant L. F. Easton is a resident and citizen of the State of Wisconsin; that the defendant G. A. Heman is a resident and citizen of the State of Missouri.

II.

This defendant admits that the cross-complainant, Maney Brothers & Company, is a co-partnership consisting of J. W. Maney and John Maney, each a citizen and resident of the State of Oklahoma, and Herbert G. Wells and E. J. Wells, each a citizen and resident of the State of Idaho.

III.

Admits that the matter in controversy, exclusive

of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

IV.

Admits that the bill of complaint of the plaintiff, Portland Wood Pipe Company, is brought to foreclose a pretended mechanic's lien alleged to cover an irrigation system, reservoir, water rights and water appropriations and the rights of way therefor, constructed by the Crane Creek Irrigation Land and Power Company, but denies that it is as a whole the identical irrigation system described in this cross-complainant's mortgage by this cross-bill sought to be foreclosed, and alleges that only a part of said system is so included in and described in said mortgage.

V.

Admits that on the 29th day of September, 1911, the Crane Creek Irrigation Land and Power Company for a valuable consideration made and delivered to the cross-complainant herein its promissory note as in words and figures and for the sum as set out in said cross-bill in paragraph XIII.

VI.

Admits that to secure the payment of said note the said Crane Creek Irrigation Land and Power Company on the same day made and delivered to the cross-complainant herein a mortgage whereby it mortgaged or attempted to mortgage to said cross-complainant the following described property, situate in Washington County, Idaho, to-wit:

(a) A certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West of the Boise Meridian, application for right of way for which was filed in the United States Land Office, Boise, Idaho, by one E. D. Ford, on the 3rd day of September, 1907, which said application was approved by Thomas Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; which said reservoir, as shown by the map (a duplicate of which is on file in the said United States Land Office at Boise, Idaho), will have a storage capacity of approximately seventy thousand six hundred and seventeen (70,617) acre feet, with a dam fifty-nine (59) feet high; and the dam for which said reservoir (is intended) is situated in the Southeast (SE) quarter of the Southeast (SE) quarter of Section 19 of said township and range; and all lands situated within said reservoir site, including the right of way secured, as aforesaid, from the Government of the United States.

(b) All canals, ditches, headgates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used, or required in connection with the distribution of the water from said reservoir, and for carrying and distributing said water to the places of intended use, now owned or constructed, or which may hereafter be acquired or constructed by the said Crane Creek Irrigation Land and Power Company, with the rights of way therefor.

(c) All water rights and rights to the use of water in connection with the reservoir and irrigation

works hereinbefore described, now owned, or that may hereafter be acquired, by said Crane Creek Irrigation Land and Power Company, and particularly including the following permits issued by the State Engineer of the State of Idaho, said permits being issued on the dates and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

(d) The lands described as follows, excluding from such description the lands subsequently released as set forth in cross-complainant's cross-bill, to-wit:

The SE¼ of Sec. 5

E½ of the SE¼, and the SW¼ of the SE¼ of Sec. 10

NE¼ of the NE¼ of Sec. 15

E½ of the NE¼ of Sec. 10

N½ of the SE¼ of Sec. 17

E½ of the NW¼ of Sec. 17

SE¼ of the SW¼ of Sec. 8

SE¼ of the NW¼, and the E½ of the SW¼ of Sec. 11

NE¼ of the NW¼ of Sec. 14
NW¼ of the NE¼, and the N½ of the NW¼, and the SW¼ of the NW¼ of Sec. 12
Lot No. 4, and the SE¼ of the SW¼ of Sec. 7
All in Township Ten North, Range Four West, B. M.
And the E½ of the SE¼ of Sec. 12, Township Ten North, Range 5 West, B. M.

All of said lands being patented and situate within the boundaries of the Sunnyside Irrigation District.

The SW¼ of Sec. 27
N½ of the NE¼, and the SE¼ of the NE¼, and the NE¼ of the SE¼ of Sec. 13

All in Township 11 North, Range 4 West, B. M., and all patented and situate within the boundaries of the Crane Creek Irrigation District.

Also the following described lands, the legal title to which is vested in the State of Idaho, but certificates for the purchase of which, under the laws of the State, are, and at the time of the execution and delivery of the said mortgage were, held by the said Crane Creek Irrigation Land and Power Company, to-wit:

The NE¼ of the SW¼ of Sec. 9
NW¼ of the SW¼ of Section 9
SW¼ of the SW¼ of Section 9
SE¼ of the NW¼ of Section 7
NE¼ of the SE¼ of Section 8
NW¼ of the SE¼ of Section 8
NW¼ of the SE¼ of Section 9
SW¼ of the NE¼ of Section 10
NE¼ of the NW¼ of Section 10

All being State lands and situate within the boundaries of the Sunnyside Irrigation District in Township 10 North of Range 4 West of the Boise Meridian.

And NW¼ of the NE¼ of Section 33
SW¼ of the NE¼ of Section 33
NE¼ of the NW¼ of Section 33
NW¼ of the NW¼ of Section 33
SW¼ of the NW¼ of Section 33
SE¼ of the NW¼ of Section 33
NE¼ of the SW¼ of Section 33
NW¼ of the SW¼ of Section 33

All in Township 11 North of Range 4 West of the Boise Meridian within the boundaries of the Crane Creek Irrigation District.

And the SE¼ of the SW¼ of Section 2, Township 10 North, Range 5 West of the Boise Meridian.

All within the boundaries of the Sunnyside Irrigation District.

And the NE¼ of the NE¼ of Section 10
SW¼ of the NE¼ of Section 10
SE¼ of the NE¼ of Section 10
NE¼ of the SE¼ of Section 10
NW¼ of the SE¼ of Section 10
SW¼ of the SE¼ of Section 10
SE¼ of the SE¼ of Section 10
NW¼ of the SW¼ of Section 11
NE¼ of the NW¼ of Section 13
NW¼ of the NW¼ of Section 13
NE¼ of the NE¼ of Section 14
NE¼ of the NE¼ of Section 15

NW¼ of the NE¼ of Section 15
SW¼ of the NE¼ of Section 15

All in Township 11 North of Range 6 West of the Boise Meridian and State lands and situate outside of the boundaries of the Sunnyside and Crane Creek Irrigation Districts.

And SW¼ of the SW¼ of Section 36
SW¼ of the SE¼ of Section 36
SE¼ of the SE¼ of Section 36
NE¼ of the SE¼ of Section 36
NW¼ of the SE¼ of Section 36

All in Township 11 North of Range 5 West of the Boise Meridian and all State lands and situate outside of the boundaries of the Sunnyside and Crane Creek Irrigation Districts.

Together with all rights of way, reservoirs, dams, canals, flumes, pipe lines, ditches and other structures forming a part of said irrigation system, whether then owned by the said Crane Creek Irrigation Land and Power Company, or thereafter constructed or acquired by said Company, with all the easements, rights of way, privileges and appurtenances thereunto belonging or in anywise appertaining, as appears by an alleged copy of said mortgage attached to said cross-bill as "Exhibit A" and made a part thereof.

VII.

The said defendant admits that said mortgage was acknowledged, certified and recorded on the 6th day of October, A. D. 1911, in Book 15 of Mortgages, beginning with page 403.

VIII.

Admits the allegations of paragraph XVI in said cross-bill as therein made, and that at the time of filing said cross-bill there was a balance due the said cross-complainant aforesaid of Thirty-five Thousand Nine Hundred Eighty-six and Ten One-hundredths ($35,986.10) Dollars, with interest thereon from the 27th day of December, 1913, at six per centum per annum.

IX.

Admits the default of the Crane Creek Irrigation Land and Power Company in the payment of taxes and other payments required to be paid, and all allegations made in paragraph XVII of said cross-complaint.

X.

Admits all the allegations made in paragraph XVIII of said cross-complaint and particularly that since the delivery of said mortgage the cross-complainant has released from the alleged lien of the said mortgage, the lands, premises and property in said paragraph particularly described.

XI.

Admits the allegations as specifically made in paragraph XIX of the cross-complaint.

XII.

Admits that the mortgage aforesaid provides for the payment by the Crane Creek Irrigation Land and Power Company of a reasonable attorney's fee for foreclosing said mortgage or bringing suit thereon.

Defendants admit that the note and mortgage hereinbefore mentioned provide for the payment by the Crane Creek Irrigation Land and Power Company of a reasonable attorney's fee if suit should be instituted for the collection or foreclosure thereof; and in this behalf defendants allege that cross-complainant is not entitled to attorney's fee, reasonable or otherwise, for the foreclosure of said mortgage; and deny that Four Thousand ($4,000.00) Dollars or any other sum is a reasonable attorney's fee for such foreclosure.

XIII.

Admits the allegations of paragraph XXI of said cross-bill as therein specifically stated and set forth, except that defendants, upon their information and belief, alleges: That the cross-complainant herein is not entitled to, and has no mortgage lien upon, the property of the defendant, Crane Creek Irrigation District, or of the defendant, Sunnyside Irrigation District, as in said mortgage and cross-complaint asserted.

XIV.

Admits that numerous pretended claims of lien have been filed against the said irrigation system, lands, rights of way and water rights, arising out of and connected with the construction of said irrigation system, and that the amount of such liens as claimed is upwards of One Hundred Fifty Thousand ($150,000.00) Dollars; but as to the allegations in said cross-complaint made that the said Crane Creek Ir-

rigation Land and Power Company is unable to pay or discharge the said indebtedness, this defendant has not sufficient knowledge to enable it to admit or deny the same; and the said defendant denies that in order to properly preserve, protect or maintain the said lands, system, water rights and franchises necessary for the use and operation thereof, and to protect the said cross-complainant and other pretended lien claimants, a Receiver should be appointed; and deny that a receivership is necessary or authorized by the facts in said cross-bill stated.

XV.

Admits that after the execution of said note by the Crane Creek Irrigation Land and Power Company, the individual defendants, E. D. Ford, A. G. Butterfield and R. C. McKinney, endorsed the said note in writing and waived presentation, demand, protest and notice of non-payment; but deny that the said endorsements were made or given for valuable or any other consideration.

XVI.

This defendant admits that no proceedings of law have been instituted or any other suit or action commenced by or on behalf of the cross-complainant herein, for the foreclosure of its said mortgage or the collection of the amount due cross-complainant.

XVII.

Further answering the said cross-bill, the defendant, Crane Creek Irrigation District, alleges:

That it is, and during all the times hereinbefore

and hereinafter mentioned was a corporation organized and existing as an irrigation district under and by virtue of the laws of the State of Idaho and particularly under the provisions of Title 14, Revised Codes of Idaho, and the laws supplemental and amendatory thereof, for the purposes of supplying that portion of the public owning, occupying, using, or cultivating lands within its boundaries, with water from the public streams and public unappropriated waters, for household, domestic, and irrigation purposes, and the cultivation of lands; and that its irrigation system, works, reservoir site, and water rights, as described in the cross-bill herein and in this answer, during all the times in said cross-bill and in this answer mentioned, were, and now are, dedicated to a public use, as aforesaid; that this defendant has hereinbefore issued its bonds at the par value of Two Hundred Forty-six Thousand Nine Hundred ($246,900.00) Dollars, in the aggregate, which said bonds have been sold and distributed to numerous individuals and corporations in different states, and which said bonds are by force of the laws of the State of Idaho, charged as a first lien upon this defendant's irrigation system, works, water rights, and reservoir site; that on the 25th day of June, A. D. 1909, the petition for the organization of this defendant as an irrigation District was filed with the Clerk of the Board of County Commissioners of the County of Washington, Idaho, signed by a majority of the holders of title and evidences of title to lands susceptible of one mode of irrigation from

a common source and by the same system of works, and by the holders of title or evidences of title to more than one-fourth part of the total area of the lands in the proposed district assessable for the purposes of the district, and setting forth the proposed boundaries and describing with the degree of certainty required by law in a tax roll, all the lands proposed to be included in the district, and in all other particulars conforming to the requirements of the law; and that said petition was accompanied by a map of the proposed district showing the location of the proposed canal and other works et cetera, and in all particulars complying with the statute in such case made and provided; and that thereafter such proceedings were had before the Board of County Commissioners of Washington County, Idaho, in which the said lands and property is situated, to-wit, on the 17th day of August, A. D. 1909, that the said Board of County Commissioners ordered an election to be held pursuant to law, and thereafter, to-wit, on the 20th day of September, 1909, an election was duly held in the said Crane Creek Irrigation District, defendant herein, and thereafter upon a canvass of the votes cast at such election, the said Board of County Commissioners on the 25th day of September, A. D. 1909, duly found and determined that more than two-thirds of the votes cast at said election were cast in favor of the organization of the said district, and that the same was duly organized as the Crane Creek Irrigation District.

And said defendant further alleges:

That subsequently, to-wit, on the 31st day of August, A. D. 1911, a petition on behalf of said district was by its Board of Directors duly filed with the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Washington, praying for approval and confirmation of the proceedings theretofore had, and for the organization of said District, and thereafter upon a hearing had as provided by law, the said District Court did on the 30th day of September, 1911, make and enter its decree approving and confirming all the proceedings, acts, and things done and performed by the said Board of County Commissioners and the Board of Directors in the matter of the organization of said District and did adjudge each and every of them to be legal and valid; and that thereupon an appeal was taken from said decree of said Court to the Supreme Court of the State of Idaho, which said Court did on the second day of January, A. D. 1912, enter its final judgment affirming the judgment of the Court below:

And said defendant further alleges:

That after the organization of said defendant as the Crane Creek Irrigation District, as aforesaid, to-wit, on the 29th day of September, A. D. 1911, Maney Brothers and Company, a co-partnership, cross-complainant herein, made and entered into a contract with the Crane Creek Irrigation Land and Power Company, which last named company was an original contractor in the construction of the system, works, and structures appertaining to the irrigation

system of said defendant, whereby it agreed to furnish certain materials and perform certain labor in the matter of such construction for the said Crane Creek Irrigation Land and Power Company for approximately the sum of money mentioned in the note and mortgage set up and alleged by said cross-complainant herein, and before any materials has been furnished or work performed, the said cross-complainant procured from the said Crane Creek Irrigation Land and Power Company the note and mortgage aforesaid; that said mortgage purported to include and create a lien upon the lands hereinbefore in this answer described as being within boundaries of said defendant's district, theretofore and then dedicated to the public uses aforesaid, and contracted by the said Crane Creek Irrigation Land and Power Company to be conveyed to said defendant, Crane Creek Irrigation District; and that said mortgage purported to include and create a lien upon all the reservoirs, reservoir sites, canals, ditches, headgates, flumes, pipe lines, dams, laterals, and other works and structures necessary and required for the public purposes aforesaid in the distribution of waters contemplated by the statutes in such cases made and provided, and also all the permits and privileges which had been contracted to be conveyed to said defendant, Crane Creek Irrigation District.

And the said defendant further alleges:

That in all the premises the said cross-complainant as a co-partnership and the individual members thereof had actual knowledge and notice of the char-

acter of said lands and property and the dedications thereof to public uses, and of the contract made by the Crane Creek Irrigation Land and Power Company with said defendant.

In consideration of the premises said defendant alleges upon its information and belief that the said Crane Creek Irrigation Land and Power Company was not authorized in law to charge the property aforesaid, and as described in the said mortgage and cross-complaint herein, with the mortgage lien for the payment of the costs of construction as hereinbefore stated, and that the said cross-complainant herein, Maney Brothers and Company, a co-partnership, had no authority to so contract with the said Crane Creek Irrigation Land and Power Company, and that the said mortgage is not and can not be charged as a lien upon or against any of the lands and property therein described, which are situate within the boundaries of this defendant, Crane Creek Irrigation District, or which is necessarily connected with or required for the effected use and operation of its said system and to that extent the same is null and void.

Wherefore, having fully answered said defendant prays that the pretended claim of mortgage lien asserted by the cross-complainant herein be denied; that cross-complainant take nothing by its said cross-bill against said defendant or its property; that the said cross-bill be dismissed as against said defend-

ant; and that it have and recover its reasonable costs in this behalf lawfully incurred.

CRANE CREEK IRRIGATION DISTRICT,
By Chas. C. Cleary, President.
ED. R. COULTER,
Weiser,
N. M. RUICK,
Boise,
C. S. VARIAN,
Salt Lake City, Utah,
Solicitors for Crane Creek Irrigation District.
Filed February 3rd, 1915.

(Title of Court and Cause.)

Statement of Evidence Under Equity Rule 75 on Appeal of Maney Brothers & Company, Cross-Complainant.

Be It Remembered, That this cause came regularly on for trial before the Court, sitting in equity on March 25th, 1915, on the cross-complaint of the defendants and cross-complainants Maney Brothers & Company, and the issues made thereon by the answers of the cross-defendants Crane Creek Irrigation District, Sunnyside Irrigation District, Crane Creek Irrigation Land & Power Company, E. D. Ford, A. G. Butterfield, and R. C. McKinney. Whereupon the following proceedings were had:

Jesse T. Johnson, being called and sworn as a witness for said cross-complainants, testified as follows:

"I am a bookkeeper for Maney Brothers & Company. I was in their employ in that capacity in Sep-

tember, 1911, and have been ever since. I am familiar with the business transactions which Maney Brothers & Company had with the Crane Creek Irrigation Land & Power Company. The paper marked 'Maney Bros. Exhibit No. 1' dated September 29, 1911, is a note which Maney Brothers & Company received from the Crane Creek Irrigation Land & Power Company. It was given for the construction of what is commonly known as the Crane Creek Reservoir. There is due on that note $35,986.10 with interest at 6% from December 27, 1913."

(The note referred to was admitted in evidence and is identical with the copy thereof set out in the exhibit attached to the Cross-Bill of Maney Brothers & Company).

"Paper marked 'Maney Bros. Ex. 2' is the mortgage securing the note which I have just identified. None of the collateral mentioned in that mortgage has been deposited with the trustee therein named."

(The mortgage referred to was admitted in evidence and is identical with the copy thereof attached as an exhibit to the Cross-Bill of Maney Brothers & Company).

"Paper marked 'Maney Bros. Exhibit No. 3' is a certified copy of the minutes of the special meeting of the Board of Directors of the Crane Creek Irrigation Land & Power Company held September 29, 1911, and it sets out a copy of the mortgage that has been introduced in evidence as Exhibit No. 2, and also

a copy of the contract. That contract was entered into by Maney Bros."

The exhibit referred to as "Maney Bros. Exhibit No. 3" is in words and figures following, except that the note and mortgage therein referred to have been omitted therefrom for the reason that they are already set out in the Cross-Bill, to-wit:

"MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF THE CRANE CREEK IRRIGATION LAND AND POWER COMPANY.

Held September 29, 1911.

Minutes of a special meeting of the Board of Directors of the Crane Creek Irrigation Land and Power Company, held at the office of the Company, at Weiser, Idaho, on the 29th day of September, 1911, there being present:

E. D. Ford, President.
A. G. Butterfield, Vice President.
R. C. McKinney.
Absent and not voting:
E. M. Heigho and
C. C. Conant (deceased).

The meeting was called to order by the President, and the Secretary proceeded to take minutes.

The Secretary then announced that since the last meeting of the board Director C. C. Conant had died, leaving a vacancy in the board of directors.

The President then read a waiver of notice of the

time, place and objects of the meeting signed by Director E. M. Heigho.

On motion duly made by R. C. McKinney, seconded by A. G. Butterfield, the following resolution was unanimously adopted:

Whereas, it is deemed expedient and for the best interests of the Crane Creek Irrigation Land and Power Company to enter into a contract with Maney Brothers & Company, for the building of the dam of this company's reservoir, known as the Crane Creek Reservoir, in Washington County, Idaho, to a height of forty-four feet, for the approximate consideration of $87,000.00; and

Whereas, a contract has this day been negotiated with the said Maney Brothers & Company by the President of this corporation providing for the construction of said dam to the height of forty-four feet, as aforesaid, which contract is according to the following tenor, to-wit:

CONTRACT.

This Agreement, Made and entered into this 29th day of September, A. D. 1911, by and between Maney Bros. & Co., (a co-partnership consisting of J. W. Maney, residing at Oklahoma City, Oklahoma, John Maney, residing at El Reno, Oklahoma, and Herbert G. Wells and E. J. Wells, both residing at Boise, Idaho), the parties of the first part, (hereinafter for convenience called the 'Contractors'), and the Crane Creek Irrigation Land & Power Company, a corporation organized under the laws of the State

of Idaho, the party of the second part, (hereinafter for convenience called the ('Company'), witnesseth:

That in consideration of the covenants and agreements herein contained and to be kept and performed by the Contractors, and the payments to be made and covenants to be performed as hereinafter provided by the Company, it is mutually covenanted and agreed as follows:

I.

The Contractors agree that they will, under the supervision and direction of the engineer of the Company, place the following material in that certain dam described in the specifications hereto attached at Exhibit 'A' and in the supplementary specifications hereto attached as Exhibit 'B', which said dam is known as the 'Crane Creek Dam' and situated in Section 19, Township 12 North, Range 2 West, B. M., Washington County, Idaho, to-wit:

1. Forty thousand (40,000) cubic yards of earth, the same to be measured in borrow pits.

2. One thousand and ten (1,010) cubic yards of concrete, to be placed in core wall, tunnel lining and retaining wall and around headgates, as may be directed by the engineer of the Company.

3. One thousand (1,000) cubic yards of rip-rapping on upstream side of dam, and four hundred (400) cubic yards of broken stone or gravel under said riprap on face of upstream embankment.

4. To construct flume containing thirty-seven thousand (37,000) feet board measure, in accordance with specifications.

5. To do all necessary excavation for core wall and stripping foundation for embankment.

All work to be done under the supervision and direction of the Company's engineer and in accordance with the plans and specifications hereto annexed as Exhibit 'A', as the same are modified and changed by the specifications hereto attached as Exhibit 'B', and to furnish all material required in such construction and do all of said work for the consideration of Eighty-seven Thousand Dollars ($87,000.00) to be paid and secured as hereinafter provided.

II.

The Contractors agree to commence the actual construction of said dam within ten days from the date hereof and to fully complete all work to be performed hereunder by the Contractors by the 1st day of January, 1912, unless prevented by storms, cold weather or climatic or other conditions or forces beyond the control of the Contractors. It being distinctly understood and agreed that the Contractors shall not be liable in damages to the Company or any one else for failure to complete said dam in time to store water therein for irrigation or other purposes during the irrigation season of 1912, and the Contractors hereby only agree to use their best efforts and endeavors to complete said dam within the time stated.

III.

It is mutually agreed that if the dam as described in said supplementary specifications, when completed to the height of forty-four (44) feet, should not

contain the yardage above specified or the amount of lumber above mentioned, or if it should require a greater yardage or more lumber, such increase or decrease shall be allowed for and additions or deductions to the total contract price above specified be made accordingly on the following basis, to-wit:

(a) For earth work, 50c per cubic yard.
(b) For concrete, $12.50 per cubic yard.
(c) For riprap, $3.00 per cubic yard.
(d) For broken stone under riprap, $3.00 per cubic yard.
(e) Lumber in flume, $55.00 per thousand, board measure.

It is mutually agreed, however, that the total additions which may be made thereto, shall not exceed Thirteen Thousand Dollars ($13,000.00), except at the option of the Contractors.

IV.

It is mutually agreed that all material used in such construction work and all work to be performed hereunder by the Contractors, shall meet the approval of Zenas N. Vaughn, engineer of the Company, or such other engineer as the Company may designate in writing to approve such work and material, and all such work shall be executed in a sound, workmanlike and substantial manner. The Company agrees that the said Zenas N. Vaughn, or an engineer representing the Company, shall be continuously at said dam during the construction thereof, and that such engineer or engineers shall have full power and authority to act for the Company in the premises, and

all work performed and material furnished by the Contractors in the construction of said dam shall be deemed to comply with the said specifications both as to workmanship and quality of material, and in every other respect, unless the Contractors or subcontractor or superintendent in charge of such work, are notified in writing of the insufficiency thereof and wherein it fails to comply with said specifications, within seventy-two (72) hours after such work is performed or material put in place. This, however, shall not release the Contractors from liability in the event such material or work should be washed out or otherwise be rendered clearly insufficient for the purposes and uses intended before the Contractors have performed all the work required to be performed by them for the general consideration of Eighty-seven Thousand Dollars ($87,000.00), as hereinbefore stated, if due to failure to comply with said specifications. But such liability shall only extend to the rebuilding or replacing of such defective work or material.

V.

Upon the completion of the work required of the Contractors hereunder, if completed in accordance with the specifications hereto annexed and marked Exhibit 'A' as modified and changed by the supplementary specifications hereto attached and marked Exhibit 'B,' and by the terms of this agreement, which, in so far as it conflicts with any of said specifications, shall prevail, the engineer of the Company shall approve said work and material and issue

and deliver to the Contractors a certificate in appropriate form showing that this contract has been performed and completed by the Contractors. Should the engineer neglect to furnish such certificate within ten days after notified by the Contractors that the work has been completed, then the Contractors, or either of them, may name one engineer, and if such engineer and the Company's engineer can not agree as to whether said work has been satisfactorily completed, they shall select a third engineer and the decision of a majority of the three engineers so selected shall be final, binding and conclusive upon all parties to this agreement. Should the engineer of the Company and the engineer of the Contractors fail to agree upon a third engineer within five days, then such engineer may be designated by the Judge of the District Court of the Seventh Judicial District of the State of Idaho.

VI.

Simultaneously with the execution of this agreement, the Company shall execute its promissory note for the sum of Eighty-seven Thousand Dollars ($87,000.00), due November 15th, 1912, bearing interest at six per cent. (6%) per annum from November 15th, 1911, and shall cause said note to be endorsed in a manner satisfactory to the Contractors by E. D. Ford, A. G. Butterfield and R. C. McKinney of Weiser, Idaho, and shall execute a mortgage on all its property, rights and franchises of a form satisfactory to the Contractors as security for the payment of said note, and any and all other sums due or to

become due under this agreement, or otherwise, from the Company to the Contractors. And upon the extra yardage and work which may be done by the Contractors under this agreement, as hereinbefore provided, being ascertained and determined, the Company shall execute its promissory note therefor, substantially similar in form to the note first above mentioned, drawing interest and falling due at the same time as the said note for Eighty-seven Thousand Dollars ($87,000.00), and the note covering such extras or additional yardage and work shall likewise be secured by the mortgage above referred to, and shall be delivered to the Contractors upon the completion of the work to be by them performed hereunder. It being understood and agreed that said extras and additional work shall not be required to be performed by the Contractors unless notice to do such work be given the Contractors in due season and before the principal contract has been substantially completed.

VII.

It is mutually agreed that the note for Eighty-seven Thousand Dollars ($87,000.00) hereinbefore mentioned, shall immediately be deposited with F. F. Johnson, Cashier of the Boise City National Bank of Boise, Idaho, as trustee or escrow holder, and shall by such trustee be delivered to the Contractors upon the certificate of engineer of the Company, or the certificate of a majority of the engineers as herein provided, that the work required of the Contractors hereunder has been completed in substantial compliance with the terms of this agreement.

VIII.

The Company further agrees to deposit with said trustee all certificates of sale issued by the State of Idaho covering lands purchased by the Company or in behalf of the Company from the State of Idaho and described in the mortgage above referred to. Such certificates shall be assigned in blank or to said trustee and properly acknowledged by the present holder thereof, and such certificates shall be held by said trustee, together with other collateral security mentioned and referred to in the said mortgage upon the terms and for the purposes stated in said mortgage. The Company shall also deposit with said trustee a certificate of stock endorsed in blank or to said trustee, covering all the stock which the Company owns in the Weiser Heights Orchard Company, being not less than two hundred and sixty (260) shares; the same to be held by the trustee as aforesaid. But upon payment of the said note or notes and all other indebtedness from the Company to the Contractors and the reasonable charges, if any, of said trustee, all of said collateral, bonds, stock and certificates of sale then remaining in the hands and in possession of said trustee, shall be reassigned and redelivered to the Company and the mortgage hereinbefore mentioned shall be fully released and discharged of record by the Contractors.

In Witness Whereof, the Contractors have caused their firm name to be hereunto subscribed by a member of the firm, and the Company has caused its name to be hereunto subscribed by its President and

its corporate seal affixed, attested by its Secretary, in duplicate, the day and year first above written.

MANEY BROS. & CO.,

By .....

CRANE CREEK IRRIGATION LAND & POWER COMPANY,

By .....
President.

Attest: .....
Secretary.

Now, Therefore, Be It Resolved, that the President and the Secretary be, and they are hereby authorized and empowered to execute said contract on behalf of this corporation, in duplicate, and in the words and figures above set forth, under the seal of the said Crane Creek Irrigation Land and Power Company, and that this corporation hereby acknowledges said contract as a binding obligation upon it.

On motion of R. C. McKinney, seconded by A. G. Butterfield, the following resolution was unanimously adopted, to-wit:

Whereas, this corporation has not sufficient funds to pay for the work contemplated by the contract heretofore authorized to be entered into with Maney Brothers and Company, heretofore presented to this meeting; and,

Whereas, as part of the conditions of said contract this corporation has agreed to execute its promissory note for $87,000.00 dated September 29, 1911, to said Maney Brothers & Company payable on November 15, 1912, with interest from the 15th day of

November, 1911, at the rate of six per cent. per annum; and,

Whereas, it is further agreed that the payment of said promissory note shall be secured by a mortgage upon all the property of this corporation; and

Whereas, the board of directors deem it necessary and expedient that said promissory note and mortgage be executed at once, said mortgage being in the words and figures following, to-wit:

(Copy of mortgage and note hereinbefore referred to and set out in Cross-Bill is here set out in minutes).

And Whereas, a full, true and correct copy of said promissory note appears on page 5 of said mortgage;

Now Therefore, Be It Resolved, That the President and Secretary be and they are hereby authorized and empowered to execute said promissory note, and the mortgage above set forth, in duplicate, and deliver the said promissory note to F. F. Johnson, Trustee, and the said mortgage to the said Maney Brothers & Company, as contemplated by said mortgage and the agreement aforesaid, and to affix the corporate seal to said promissory note and mortgage; and

Be It Further Resolved, That the President be and he is hereby authorized and empowered to do all things required to be done by said contract and mortgage and to deposit with the trustee all the necessary deeds, contracts, stock certificates and assignments required to be deposited with him by the provisions of either said contract or mortgage and to furnish

whatever data that he may deem necessary to be furnished said Maney Brothers & Company, or said Trustee, in the premises.

No further business appearing the meeting adjourned.

State of Idaho,
County of Washington,—ss.

I, E. P. Hall, the duly elected, qualified and acting Secretary of the Crane Creek Irrigation Land and Power Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, do hereby certify that the foregoing consisting of 18 pages including this contains a full, true and correct copy of the minutes of a special meeting of the board of directors of said corporation held at the office of the Company at Weiser, Idaho, on the 29th day of September, 1911, at 8:30 o'clock P. M.

In witness whereof, I have hereunto set my hand and affixed the seal of said corporation the 7th day of October, 1911.

(Seal) E. P. HALL,
Secretary Crane Creek Irrigation Land and Power Co."

"Exhibits 1 and 2 of Maney Brothers & Company were executed pursuant to this contract."

E. R. Coulter, a witness on behalf of the cross-defendants, being first duly sworn, testified as follows:

"I am the Secretary of the Sunnyside Irrigation District and have been Secretary of that District

since about April, 1913. I have the custody of all the records of the District. I have been attorney for the Sunnyside and Crane Creek Irrigation Districts since their inception; in fact, I organized the districts, and have been familiar with all their transactions from the very inception of them to the present time."

"The paper marked 'Defendants Sunnyside and Crane Creek Irrigation Districts' Exhibit B' is the original contract entered into on the date therein mentioned, between Crane Creek Irrigation Land and Power Company, and Sunnyside Irrigation District."

The exhibit referred to as "Sunnyside and Crane Creek Irrigation Districts' Exhibit B" is in words and figures following, except that the plans and specifications thereto attached have been omitted therefrom, and we ask that the Court make an order transmitting and requiring the original plans and specifications attached to said original contract "Exhibit B" to be forwarded with and as a part of the record on appeal in the above entitled action.

This Agreement, made and entered into in duplicate this 22d day of August, 1910, by and between the Crane Creek Irrigation Land and Power Company, a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal place of business at Weiser, Washington County, Idaho, (hereinafter called the "Company") the party of the first part, and the Sunnyside Irrigation District, a corporation

duly organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its principal place of business in said district in Washington County, State of Idaho, (hereinafter called the "District"), the party of the second part,

Witnesseth: That, whereas, the Company has acquired the right to store, impound, divert and distribute for irrigation, power and domestic purposes certain waters of Crane Creek, in Washington County, Idaho, and the tributaries thereof, and the flood waters flowing therein, under certain water rights and water appropriations hereinafter more particularly described, and,

Whereas, The Company is also the owner of a partially constructed irrigation system, consisting of a dam site, reservoir, dams, canals, and other structures being constructed for the purpose of storing, impounding, diverting and distributing, under the water rights and water appropriations above referred to, the said waters of Crane Creek and its tributaries, and is also the owner of certain water rights of way for said reservoir, dams, canals and other structures being constructed and about to be constructed and situate in the County of Washington, State of Idaho, and,

Whereas, the District is a corporation duly organized under the laws of the State of Idaho, and has full power and authority to acquire and hold, appropriate and maintain reservoirs, canals, dams, aqueducts, ditches, pipe lines, tunnels, flumes and other structures and irrigation works for storing, im-

pounding, diverting, carrying and distributing water for irrigation purposes to lands and holders of lands within the boundaries of said Sunnyside Irrigation District, in accordance with the statutes of Idaho, in such cases made and provided; and,

Whereas, for the consideration hereinafter stated, the Company hereby agrees to sell and agrees to convey, and the District hereby agrees to purchase and agrees to receive conveyance of that certain portion of said water rights, water appropriations, and rights of way more particularly hereinafter described, and that portion of such works and irrigation system as constructed, as the times and in the manner hereinafter particularly set forth; and the Company for said consideration, hereby agrees to convey to the District together with said portion of said water rights, water appropriations and rights of way, that certain portion of the reservoir, dams, canals, pipe lines, flumes, laterals and other works composing such irrigation system completed within the time and in the manner hereinafter particularly set forth;

Now Therefore, in consideration of the premises, and in consideration of the sum of Ten Dollars ($10.00) by each of the parties hereto to the other in hand paid, and in consideration of the mutual covenants and agreements herein contained to be kept and performed by the parties hereto, respectively, and for the purpose of evidencing an understanding and agreement between the parties hereto, the said parties have agreed and hereby do agree as follows, to-wit:

I.

That said reservoir, dams, pipe lines, flumes, canals, laterals and other structures forming part of said irrigation system, all situated in Washington County, Idaho, shall when completed substantially conform to the plans and specifications prepared by A. J. Wiley and Z. N. Vaughn, hereto attached and made a part of this contract, and such additional plans and specifications as may hereafter be approved by the parties in the manner hereinafter provided.

II.

The property to be conveyed is:

(a) An undivided thirty-five and twenty-six one-hundredths per cent. (35.26%) interest of, in and to that certain permit No. 1720, issued by the State Engineer of the State of Idaho, under date of December 16, 1905, to one Edwin D. Ford, and recorded in Book 6 at page 1729 of the records in said State Engineer's office at Boise, Idaho, and heretofore conveyed to the Company, together with a like proportion of all the water thereby appropriated and all rights acquired under said permit; also thirty-five and twenty-six one-hundredths per cent. (32.26%) of the right of all flowage through the Northwest quarter of the Northeast quarter and the North half of the Northwest quarter of Section 19, Township 12 North of Range 2 West of the Boise Meridian, in Idaho; also thirty-five and twenty-six one-hundredths per cent. (35.26%) of the right of flowage through the Northeast quarter of Section 24 in Township 12, North of Range 3 West of the Boise Meridian, in

Idaho, heretofore conveyed to the Company by Edwin D. Ford, and Hortense A. Ford, under date of May 9, 1910.

(b) An undivided thirty-five and twenty-six hundredths per cent. (35.26%) interest of, in and to all and singular such rights of way for canals, flumes and laterals as may be used in common by said District, the Company and its other grantees, acquired by the Company by purchase or by filing maps thereof as required by the Regulations of the General Land Office of the United States, and the Acts of Congress in relation thereto, including an undivided thirty-five and twenty-six one-hundredths per cent (35.26%) interest of, in and to said reservoir site as described in that certain indenture, dated May 9, 1910, between Edwin D. and Hortense A. Ford and the Company, which said indenture is of record in Book .... of Deeds at Page .... of the Records in the office of the County Recorder of Washington County, Idaho.

(c) An undivided thirty-five and twenty-six one-hundredths per cent (35.26%) interest of, in and to all canals, pipe lines, flumes and acqueducts situate wholly without the boundaries of said irrigation district, as shown upon the plat attached hereto and used in connection with said district, or appurtenant thereto.

(d) All and singular the main canals, distributing laterals, pipe lines and flumes situate wholly within the boundaries of said irrigation district, as appear from the plat hereto attached, subject to the

conditions hereinafter mentioned, including all the rights of way for the same now owned or hereafter to be acquired by the Company.

III.

Modifications in the plans and specifications above referred to may be made with the consent of the Engineer of the Company, and the Engineer of the District, and where they cannot agree, then by an engineer by them jointly selected, but which third engineer shall in nowise be connected with the Company, the District, or with any contractor or sub-contractor on the work; provided that no modifications of such plans or specifications shall be made other than such as may be found necessary because of the unforseen character of the material to be excavated, or conditions to be overcome; and provided that no modifications of such plans or specifications shall be made except such as shall improve the system and works and especially that part of the same affected by such modifications, and provided further that any such modifications shall not invalidate any bond or bonds as hereinafter provided for.

IV.

That the capacity of the reservoir now in process of construction by the Company shall when final conveyance is made hereunder be not less than fifty thousand (50,000) acre feet of water, and when finally completed said reservoir shall have a capacity of approximately seventy thousand six hundred and seventeen (70,617) acre feet of water.

V.

The main canal, pipe lines and flumes carrying the water from such reservoir to the place of use by the District and each main lateral therefrom shall be of the size and have the fall prescribed in the plans and specifications hereto attached.

VI.

The Company agrees to have all the works above described completed by the first day of May, 1912, and the dam to be completed within one year from the date of this contract, and to be of a sufficient capacity to impound all of the water contracted for by the Crane Creek and Sunnyside Irrigation Districts.

VII.

That upon the execution of this agreement, the Company agrees to convey to the District, the receipt of which is hereby acknowledged, an undivided thirty-five and twenty-six one-hundredths per cent (35.26%) interest of, in and to said water right and reservoir site, excepting the right of possession thereof which is to be held until final conveyance, as herein provided; and upon the completion of any portion of said irrigation system, as shown by each monthly estimate in the construction thereof, the Company agrees to convey to the District such completed portion with the same proportion of the rights of way for such system; and upon the completion of the whole of such system within the time above specified, to convey the whole of the undivided interest of, in and to said water rights, appropriations, reservoir

sites, rights of way, canals, dams, pipe lines, flumes, laterals and other structures, with the appurtenances, contemplated in this agreement and agreed to be sold and conveyed hereunder, together with the possession thereof to the district; Provided, that within twenty (20) days after the signing of this agreement, and upon the delivery by the Company to the District of the bonds hereinafter provided for, the District will deliver to the Company its coupon bonds of the face value of One Hundred Thousand Dollars ($100,000.00) and, upon the receipt of the conveyance above referred to, after each monthly estimate, will deliver its coupon bonds to the Company at face value to an amount equal to such part of the entire bond issue of said District, to be sold and delivered hereunder, as the constructed portion of said works of said Company bears to the entire works to be constructed for the use and benefit of said District.

VIII.

The District in consideration of the covenants and agreements herein contained to be kept and performed by the Company, and in full payment for said water rights, irrigation system, reservoir, dams, canals, aqueducts, pipe lines, flumes and other structures forming a part of such irrigation system thus sold and to be sold and conveyed when completed as herein provided, hereby agrees to deliver to the Company in the manner hereinafter provided, the coupon bonds of the District, at their face value to the amount of Four Hundred and Fifteen Thousand Dollars ($415,000.00).

IX.

In arriving at the amount of the consideration to be paid to the Company by the District, as hereinbefore set forth, the basis is that for each acre of land receiving a full water right, the bonds of the District, in the sum of Fifty Dollars, ($50.00) shall be paid by the District to the Company; and for each acre of such lands receiving a fractional part of a full water right, the District shall pay the Company the bonds of the District in the same fractional part of Fifty Dollars ($50.00); the sum in each instance to be determined by the assessment it benefits against said lands, in the manner provided by law. No bonds are to be delivered by the District to the Company for those lands against which no benefits are assessed.

X.

The District is fully aware that the Company shall have the right to sell and transfer the bonds so delivered and to be delivered to the Company by the District hereunder, to divers persons, and by reason thereof any failure on the part of the Company to comply with the terms of this agreement, or any of them, shall in no wise affect the validity of such bonds or any of them as binding obligations of the District.

XI.

All conveyances provided for herein shall be by good and sufficient deed and in the usual form and shall be of such character as will meet the approval of counsel for the respective parties hereto, and all

property conveyed shall be free and clear of all incumbrances.

XII.

It is understood and agreed that the acceptance by the District of the conveyance of the constructed portions of the work as completed by the Company, based on the monthly estimates, shall in no case be deemed a final acceptance of such property or any part thereof, or be deemed a waiver of any rights of the District to require a full conveyance of that portion of the entire system contemplated under this agreement, when the same shall be fully completed as herein provided, nor a waiver of any right to object to any imperfect work, or construction whether as to workmanship or materials used relative to any conveyed or other portion of such work until finally accepted as herein provided, nor a waiver of the right of the District to require before acceptance, that all faulty or imperfect work, or materials, or construction, be torn out and rebuilt in accordance with the plans and specifications therefor before final acceptance of the same.

XIII.

The Company will furnish all material and build a suitable dam at the place designated in the plans, according to the plans and specifications therefor; together with all canals, main laterals and waste ways necessary to carry the water required for the lands situated in said irrigation district, and of sufficient capacity to, under normal conditions, and without endangering the strength of said canals and main later-

als, carry the water contemplated to be stored for the District under this contract, all of the same to be built and constructed in the manner approved by the Engineer of the Company and according to the plans and specifications therefor.

XIV.

The Company will build and construct, at its own proper cost and expense, a telephone line along the right of way of said canal to the dam site, to be conveyed to the District, but reserving unto the Company the perpetual right to use and occupy said poles for the purpose of carrying its own telephone wires; the cost of maintaining and renewing said telephone line after the completion and acceptance by the District, to be shared by the parties thereto in proportion to their respective interests; and it is hereby stipulated that the interest of the District in the same is to be a thirty-five and twenty-six one hundredths per cent (35.26%) interest.

XV.

The Company will furnish said District 24,900 acre feet of water to be stored in each season in said reservoir, delivered in the reservoir, and to be used as desired by the District during the irrigation season in each year, as part of the consideration of this contract; provided, however, that in the event there shall be a shortage of water in any season, caused by no fault or neglect on the part of the Company, and the water stored in said reservoir shall not equal the maximum amount stored therein under ordinary conditions in ordinary years, then and in that event,

the District shall pro rate with the other tenants in common of said reservoir, the actual amount of water stored therein for said season in proportion to the interest owned by the District in said reservoir, that is to say: thirty-five and twenty-six one hundredths per cent (35.26%) of the entire amount of water stored for said season, and it is expressly contracted that the Company shall not sell a greater amount of water, or interest in said system representing a greater amount of water in the aggregate, including the water and interest it has hereinbefore contracted to sell to the District, then the total amount of water, which, in ordinary years, under ordinary conditions, shall be stored in said reservoir.

If for any reason any portion of the acreage included within said District, and for which is included in this contract a water supply, should lie above the main canal as finally determined and constructed, or against which no benefits shall be assessed, a deduction shall be allowed in the above amount at the rate of fifty dollars ($50.00) per acre for all acreage excluded, and the quantity of water to be furnished shall also be reduced at the rate of three (3) acre feet of water for each acre so excluded, and the interest in the reservoirs, rights of way and main canals situate outside of said irrigation district, shall also be reduced proportionately.

XVI.

It is covenanted and agreed that no bonds shall be issued, or water rights or maintenance charges taxed against any lands within said district which re-

ceive no benefits from the irrigation works and against which no benefits shall be assessed by the District.

XVII.

On all bonds delivered by the District to the Company, the Company agrees to reimburse the District for the interest paid thereon for the time from the date of the issuance of the bonds until the completion of said system by the Company, and the acceptance of the same by the District. The Company agrees to advance and pay for the District, the interest due on July 1st on said bonds, of the first irrigation season after the completion of said system. The District to repay said advancements to the Company on the first day of January, following the first irrigation season said water is used by the District.

XVIII.

It is further understood and agreed, as part of the consideration and purchase price of said irrigation works, that the exclusive right to the perpetual use of all water stored in said reservoir site by means of said proposed dam, or any dam, or otherwise, for power and other purposes at any point or points between the dam and the head-gate of the main canal, is hereby reserved to the Company, its successors and assigns forever, provided, however, that such use for power and other purposes shall not in any way interfere with the use of said water by the District whenever needed for irrigation purposes; and provided, further, that whenever the water is so used for such power or other purposes, the duty and cost of patrol-

ling the dam shall be borne entirely by the Company.

XIX.

It is further covenanted and agreed that the use of water furnished to said District under this contract is to be, and the same is hereby limited to those certain specified tracts which are included within the boundaries of said District, as the same existed at the time of the bond issue and against which are assessed the benefits of said irrigation system.

XX.

It is understood and agreed that the Company reserves and shall have the sole right to contract for and sell in the future any and all water which may be needed by any lands within (or without) said irrigation district, as the boundaries thereof now exist or as they may be hereafter extended, against which no benefits, or merely nominal benefits are assessed, and to have the use of any canals or laterals owned by the District to transport the same under the direction of the District to the persons to whom it may sell water; provided, it builds such canals of sufficient size to provide for future requirements in the first instance or that it enlarge said canals at its own proper cost and expense when needed, and pay the same rate or proportion of the maintenance charges as is paid by the other land owners, and provided, further, that in the event the Company shall desire to enlarge said canals as hereinbefore set forth, it shall do so at such times and in such manner as not to interfere with the use and enjoyment of the Dis-

trict of its water and vested rights; and the Company further reserves to itself the sole and exclusive right to enlarge the storage capacity of said reservoir, but only in accordance with the plans and specifications to be approved by the State Engineer of the State of Idaho, before such enlargement; and provided, further, that such enlargement shall be made in such manner as not to endanger the property and rights of the District; and provided, further, that in the event the Company shall enlarge said reservoir to a capacity in excess of 70,617 acre feet, then and in such event in case of shortage of water or in extraordinary or dry seasons, the District will not be required to prorate the water to be stored in said reservoir, as provided in Section XV of this contract, with the other tenants in common to the extent of more than 70,617 acre feet, that is to say that when nary season shall be less than 70,617 acre feet, the District shall prorate only with the other tenants in common owning the first 70,617 acre feet, including the District, but when the amount of water stored equals 70,617 acre feet or more the District shall be entitled to its full quota of water provided for under this contract.

XXI.

It is further agreed that before any petition for the annexation to said District of adjacent lands, shall be granted, the directors of the District shall cause petitioners named in said petition to pay or provide satisfactory security for the payment, in addition to any other amount which is provided for,

the sum of Fifty Dollars ($50.00) per acre, with interest, as a maximum, which shall be paid to the Company upon its furnishing the additional amount of water required to irrigate said land, at the rate of three (3) acre feet of water per acre, and in case said land already has a partial water right the Company may, at its option, accept such reduction from the above maximum as may in its judgment be just and proper, and only such reduction as may be satisfactory to the Company will be accepted by the Directors of said District, provided, that in the event of the taking in of lands under such conditions, the Company shall at its own proper cost and expense, enlarge the canals and laterals to a sufficient capacity to carry said water for said additional lands.

XXII.

As certain lands included in the District are embraced in desert and homestead land entries, title to which is in the United States, and by reason whereof annual assessments for the payment of principal and interest on the bonds of such District cannot be enforced against such lands until title thereto passes to the entryman, the Company hereby agrees to advance and pay to the District, any and all delinquent payments of the holders of such desert or homestead lands, that would be applicable to the payment of the principal or the interest of the bonds of the District, or any of them, until the title to such land passes from the United States to those entitled to receive the same, and in consideration of which the District agrees to adopt and enforce such by-law or by-laws

as may be necessary to require the claimants to such lands to pay any and all of the said assessments against such lands annually in advance of the right to use or apply any water from such irrigation system to the irrigation of such lands, or any portion thereof, pending the passing of title thereto from the United States.

And the District hereby agrees to use its utmost endeavors by providing stringent by-laws, and otherwise, to collect all taxes assessed against said unpatented lands on account of the payment of the principal or interest of the bonds of the District, that may become delinquent, or be not paid by the entryman, and which shall under the provisions of this agreement be advanced by the Company, and when so collected the District will reimburse the Company for any sums advanced by it to the amount collected by the District.

XXIII.

It is further agreed, that upon the completion of the irrigation system and before the final conveyance thereof as herein provided, to the District, the same shall be accepted by a resolution of the Board of Directors of the District, within thirty (30) days after written notice of such completion, showing that the same has been constructed in accordance with the plans and specifications herein referred to, and in the event of a disagreement in relation thereto, the engineer of the District and an engineer to be designated by the Company, shall select an engineer wholly

disconnected in every way with the Company or the District, or any contractor on said construction, and a decision of a majority of such three engineers as to whether or not such work has been constructed in accordance with the plans and specifications will, in the absence of fraud, be final, and in the event such works have not been so constructed as determined by such engineers, the Company shall proceed at once to complete the works in conformity with such plans and specifications.

XXIV.

It is contracted that there shall be no charges against the District by the Company, for extra cost of construction necessitated by any change of plans or any fault or omission contained in the plans and specifications for such system. All such extra expense, if any, to be borne by the Company.

XXV.

The Company shall remove and replace at its own expense, any work that shall have been improperly executed. All work contemplated in this agreement must be done subject to the approval of the engineer of the District, but should there be a disagreement beween the engineer of the District and the engineer of the Company over any such work, the same shall be decided by an engineer to be by them jointly selected but which third engineer shall be in no wise connected with the Company, the District, or any contractor on the work, and his decision shall be final in the premises.

XXVI.

It is contracted that the Company shall be responsible for all damages arising from accidents or neglect of the contractors or their workmen in the construction of said system and to hold the District harmless by reason of any such damages arising from the execution of this agreement.

XXVII.

Upon the execution of this agreement the Company agrees to give the District good and substantial bonds in the sum of One Hundred Thousand Dollars ($100,000.00), Fifty Thousand Dollars ($50,000.00) of which bonds may be given by a Surety Company and Fifty Thousand Dollars ($50,000.00) by individuals, and all to be approved by the District, conditioned for the faithful performance of the terms of the agreement by the Company to be kept and performed, and for the construction of the irrigation works covered by this agreement, in accordance with the plans and specifications herein mentioned, and their completion and conveyance within the time herein stated, and for the maintenance of said system for a period of five (5) years, pursuant to the conditions of this contract.

XXVIII.

It is mutually covenanted and agreed by and between the parties hereto that in case the Company shall not increase the storage capacity of its dam and reservoir site to 70,617 acre feet of water, within five (5) years from the delivery and acceptance of the proportion of said irrigation system, etc., contem-

plated by this contract, then and in that event the Company, by good and proper conveyance will convey unto the District, an additional percentage of interest in and to the reservoir, reservoir site, water permit, flowage rights, canals, flumes, laterals, etc., mentioned and described in Paragraphs a, b and c of the section numbered II of this contract, equal to fourteen and forty-five one-hundredths per cent (14.45%) thereof, so that the District will own and have a forty-nine and seventy-one one-hundredths per cent (49.71%) interest of, in and to the said described works.

It being understood and agreed that the basis by which the percentage mentioned in this contract are obtained, is the maximum capacity of the reservoir in acre feet as compared with the amount of water hereby sold in acre feet, so that if the reservoir is increased to 70,617 acre feet capacity the percentage set forth in Paragraph II is correct and shall stand but shall be increased as herein provided in the event the capacity of the reservoir shall not be increased from 50,000 to 70,617 acre feet of water.

XXIX.

It is mutually agreed that the following maps, blue prints, plans and specifications hereinbefore referred to as "the plans and specifications" and endorsed on the face and margin thereof, "E. D. Ford, President, Crane Creek Irrigation Land and Power Company, and O. M. Harvey, President, and A. D. Redford, Secretary, Sunnyside Irrigation District, and C. C. Cleary, President, and Maude Kiser, Secretary,

Crane Creek Irrigation District," are hereby referred to and made a part of this contract, to-wit: The attached sheets and writings numbered 1 to 10 both inclusive.

XXX.

It is mutually understood and agreed that the provisions of this agreement shall be binding upon the parties hereto, their successors and assigns.

In Witness Whereof, the respective parties hereto have caused their corporate names to be hereunto subscribed by their respective presidents, sealed with their corporate seals and duly attested by their respective secretaries, the day and year first above written, pursuant to the authority of a resolution of their respective Boards of Directors.

CRANE CREEK IRRIGATION LAND
AND POWER COMPANY,
By E. D. Ford, Its President.

Attest: E. P. Hall, Secretary.
Crane Creek Irrigation
Land and Power Company,
Idaho, incorporated 1909.
SEAL.
Witnessed by Ed. R. Counter.

SUNNYSIDE IRRIGATION DISTRICT,
By O. M. Harvey, Its President.

Attest: A. D. Redford, Secretary.
Sunnyside Irrigation
District, Corporate
SEAL.

The paper marked "Sunnyside Exhibit T" is contract dated Jan. 3, 1911, between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District, for extensions of time when the Crane Creek Irrigation Land and Power Company should put up the indemnity bond called for in Sunnyside and Crane Creek Irrigation Districts' Exhibit B.

The paper marked "Sunnyside Exhibit T" is in words and figures following, to-wit:

Weiser, Idaho, January 3, 1911.

This Agreement, Made and entered into by and between Sunnyside Irrigation District, hereinafter called the District, the party of the first part, and the Crane Creek Irrigation Land and Power Company, hereinafter called the Company, the party of the second part, Witnesseth:

Whereas, under the provisions of Section 7 of that contract heretofore made and entered into by and between the parties hereto on the 22nd day of August, 1910, for the purchase by the party of the first part from the party of the second part of sufficient interest in the dams, reservoir, water, water rights, irrigation system, ditches, and laterals, now constructed, being constructed and to be constructed by the party of the second part to irrigate all the irrigable lands situate within the irrigation district, of the party of the first part, which contract is spread on the records of the minutes of the meeting of the Board of Directors of the party of the first part, of date of August 22,

1910, it is provided that within twenty days from the signing of said agreement and contract, and upon the delivery by the company to the district of the bonds hereinafter provided for, the District will deliver to the Company its coupon bonds of the face value of One Hundred Thousand ($100,000.00) Dollars, and

Whereas, under the provisions of Section 27 of said contract, it is provided that the Company shall deliver to the District its good and substantial bonds in the sum of One Hundred Thousand ($100,000.00) Dollars, as in said Section 27 of said contract is specifically set forth; and,

Whereas, it is impossible for the party of the first part to deliver said bonds until the apportionment of benefits against the lands of said District has been made and approved by the Court, all of which has not yet been done.

It is now mutually agreed by and between the parties hereto, in consideration of the premises, that the time for the delivery of said bonds by each of the respective parties to the other shall be extended until the apportionment of said benefits against the lands in said District shall be made by the party of the first part and the same shall be approved and settled by proper and final decree of the Court.

It is further mutually agreed that this agreement shall in no case make void or in any manner change any of the terms or conditions of said agreement spread upon the records of the minutes of said meeting of the Board of Directors, of date of August 22,

1910, and that the same shall continue in full force and effect in all reports and in their entirety save and except as to the time of the delivery of said bonds as is hereinbefore set forth.

In Witness Whereof, the respective parties hereto have caused their corporate names to be hereunto subscribed by their respective presidents, sealed with their corporate seals, and duly attested by their respective secretaries, the day and year first above written, pursuant to the authority of the resolution of their respective Boards of Directors.

SUNNYSIDE IRRIGATION DISTRICT,
(Seal) By O. M. Harvey, Its President.
Attest: A. D. Redford, Secretary.
CRANE CREEK IRRIGATION LAND & POWER COMPANY,
(Seal) By E. D. Ford, Its President.
Attest: E. P. Hall, Secretary.

The paper marked "Sunnyside Exhibit M", is a contract dated October 3, 1911, for the extension of time for the completion by the Crane Creek Irrigation Land and Power Company of the irrigation system for Sunnyside and Crane Creek Irrigation District, which paper "Sunnyside Exhibit M", is in words and figures as follows, to-wit:

This Agreement, Made and entered into this the 3rd day of October, 1911, in duplicate, by and between the Sunnyside Irrigation District, a municipal corporation, within Washington County, State of Idaho, the party of the first part, and the Crane Creek Irrigation Land and Power Company, a cor-

poration, organized and existing under the laws of the State of Idaho, the party of the second part, Witnesseth:

That, Whereas, there is now existing between the parties hereto a contract in writing dated the 22nd day of August, 1910, for the erection, construction and completion of a certain dam, reservoir and irrigation works known as the Crane Creek Dam, Reservoir and Irrigation Works, and for the conveyance by the party of the second part to the party of the first part of certain portions or interest in said dam, reservoir and system; and,

Whereas, Article VI of said contract provides among other things that said dam shall be completed so as to store 50,000 acre feet of water in the reservoir by not later than the 22nd day of August, 1911, and that the entire proposed irrigation systems shall be completed by the 1st day of May, 1912; and,

Whereas, the party of the second part now desires to extend the time in which said dam and irrigation works shall be completed;

Now, Therefore, in consideration of the sum of one dollar to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and other considerations hereinafter set forth, it is agreed by and between the parties hereto as follows, to-wit:

That the party of the first part hereby extends the time for the completion of the dam mentioned in paragraph VI of said contract dated August 22nd, 1910, from the 22nd day of August, 1911, to the 1st

day of September, 1913, and hereby extends the time for the completion of the works mentioned in said contract, from the 1st day of May, 1912, as set forth in said paragraph VI of said contract aforesaid to and until the 1st day of September, 1913.

The party of the second part, in consideration of the extensions of time aforesaid hereby agrees that it will forthwith and as soon as possible, commence work upon the dam and complete a portion of the same, building to the height of forty-four feet, before the 31st day of December, 1911, the elements and weather permitting.

The party of the second part, for and in consideration of said extensions aforesaid, hereby contracts and agrees that in the event said reservoir, dam and irrigation system shall not be completed and ready for delivery to the party of the first part as called for by paragraph VI of said contract as amended by this contract, on or before the 15th day of May, 1913, the party of the second part agrees to reimburse the party of the first part for the interest on all bonds of the District delivered by the District to the Company, for the time from the date of issuance of said bonds until the 1st day of January, 1914, and also agrees to advance and pay for the District, the interest due July 1st on said bonds for the first irrigation season thereafter, the District to repay said advancements to the Company on the 1st day of January following; and that the provisions of paragraph XVII of said contract aforesaid shall remain in full force and effect except as herein changed.

That said contract of August 22nd, 1910, shall in all other particulars be and remain in full force and effect, and that the bonds called for by said contract, to be executed and delivered by the second party to the first party hereto, shall cover this contract as well as said contract of August 22nd, 1910.

In Witness Whereof, the party of the first part has caused these presents to be executed by the Chairman of its Board of Directors, attested by its Secretary and sealed with its corporate seal, being thereunto duly authorized by a resolution of its Board of Directors duly passed on this day; and the party of the second part has caused these presents to be executed by its president, sealed with its corporate seal and attested by its Secretary, being thereunto duly authorized by resolution of its Board of Directors duly passed, all on the day and year first above written.

SUNNYSIDE IRRIGATION DISTRICT,
(Seal) By O. M. Harvey, its President.
Witnessed by: John H. Norris, J. F. Clabby.
Attest: A. D. Redford, Secretary.
CRANE CREEK IRRIGATION LAND AND POWER COMPANY,
(Seal) By E. D. Ford, its President.
Attest: E. P. Hall, Secretary.

The paper marked "Sunnyside Exhibit O" is a contract between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District

for the extension of time in which said Crane Creek Irrigation Land and Power Company should complete the irrigation system for said district, which paper so marked "Sunnyside Exhibit O" is in words and figures as follows, to-wit:

This Agreement, Made and entered into this the 19th day of April, 1913, by and between Sunnyside Irrigation District, a municipal corporation of Washington County, Idaho, party of the first part, and Crane Creek Irrigation Land and Power Company, a corporation organized and existing under the laws of the State of Idaho, the party of the second part, Witnesseth:

Whereas, There is now existing between the parties hereto a certain contract dated August 22, 1910, for the erection, construction and completion of a certain dam, reservoir and irrigation works known as the Crane Creek reservoir and irrigation works, and for the conveyance by the party of the second part to the party of the first part of the certain portions or interest in said dam, reservoir and system, and,

Whereas, Article Six of said contract provides, among other things, that said dam shall be completed so as to empound 50,000 acre feet of water in the reservoir by not later than the 22nd day of August, 1911, and that the entire proposed irrigation system shall be completed not later than the 1st day of May, 1912, and

Whereas, By a supplemental agreement made and entered into on the third day of October, 1911, the

party of the first part extended the time for the completion of the dam mentioned in said paragraph Six of said contract dated August 22, 1910, from the 22nd day of August, 1911, to the 1st day of September, 1913, and extended the time for the completion of the works mentioned in said contract from the first day of May, 1912, as set forth in said paragraph Six of said contract, to the first day of September, 1913, and

Whereas, at this time, the party of the second part is desirous of further extension of time for the completion of said dam and irrigation works, and

Whereas, The dam and reservoir called for by said contract of August 22nd, 1910, has already been partially completed by the party of the second part, and to the extent that the same will now and does empound the sum of 35,000 acre feet of water,

Now, Therefore, In consideration of the sum of One Dollar ($1.00) to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and of other considerations hereinafter set forth, it is agreed by and between the parties hereto as follows, to-wit:

That the party of the first part hereby extends the time for the completion of the dam mentioned in in paragraph Six of said contract dated August 22, 1910, from September 1, 1913, to April 15, 1914, and hereby extends the time for the completion of the works mentioned in said paragraph of said contract of August 22, 1910, from the first day of Sep-

tember, 1913, to and until the fifteenth day of April, 1914.

Party of the second part, in consideration of the extension of time aforesaid, hereby agrees that it will forthwith and at once commence work upon the dam and complete the same to the requirements of said Paragraph Six of said contract of August 22, 1910, on or before the 15th day of April, 1914.

And the party of the second part, for and in consideration of said extension of time as aforesaid, does further contract and agree that in the event said reservoir, dams and irrigation system shall not be completed and ready to deliver to the party of the first part as called for in Paragraph Six of said contract, as amended by said contract of October 3, 1911, and this contract, on or before the 15th day of April, 1914, party of the second part will reimburse party of the first part for the interest on all bonds of the District delivered by the District to the Company for the time from the date of the issuance of said bonds until the first day of January, 1915, and also agrees to advance and pay to the district, the interest due on July first on said bonds for the first irrigation season thereafter, said District to repay said advancement to the Company on the first day of January following.

Paragraph XVII of the construction agreement dated August 22, 1910, as modified is hereby further modified in the following extent: The district will not require the company to pay any interest on any

bonds delivered to it, after January 1, 1914, provided the irrigation system is completed and ready to deliver to the District on or before April 15, 1914, except as provided for in this agreement.

That said contract of August 22, 1910, shall in all other particulars be and remain in full force and effect and that the bonds called for by said contract shall be executed and delivered by the party of the second part to party of the first part hereto to cover this contract as well as said contract dated the 22nd day of August, 1910.

In Witness Whereof, The party of the first part hereto has caused this contract to be executed by the Chairman of its Board of Commissioners, attested by its Secretary and sealed with its corporate seal, being thereunto duly authorized by a resolution of its Board of Directors duly passed on this day, and the party of the second part has caused these presents to be executed by its President, sealed with its corporate seal and attested by its Secretary, being thereunto duly authorized by a resolution of its Board of Directors, duly passed this day, all on the day and year first above written.

SUNNYSIDE IRRIGATION DISTRICT,
(Seal) By O. M. Harvey, its President.
Attest: Ed R. Coulter, Secretary.
CRANE CREEK IRRIGATION LAND AND POWER COMPANY,
(Seal) By E. D. Ford, its President.
Attest: E. P. Hall, Secretary.

The paper marked "Sunnyside Exhibit S" is a joint contract between Crane Creek Irrigation Land and Power Company and Sunnyside and Crane Creek Irrigation District, dated April 19, 1913, relative to the indemnity bond. Said contract marked "Sunnyside Exhibit S" is in words and figures as follows, to-wit:

This Contract, Made and entered into in triplicate this the 19th day of April, 1913, by and between Crane Creek Irrigation Land and Power Company, hereinafter called the Company, party of the first part, and Crane Creek Irrigation District, the party of the second part, and Sunnyside Irrigation District, the party of the third part, witnesseth:

Whereas, On August 22, 1910, the Company of the party of the second part entered into a written contract for the sale and construction by the Company and delivery to the party of the second part of an irrigation system as in said contract specifically set forth, which contract is hereby referred to and made a part hereof;

And Whereas, By a contract of the same date, the Company as party of the first part entered into a similar contract with Sunnyside Irrigation District, as second party thereto, for the construction of an irrigation system for said Sunnyside Irrigation District, which contract was in writing and is hereby referred to and made a part hereof;

And Whereas, The reservoir, water rights, main canals, etc., of the system to be built and furnished to Sunnyside Irrigation District and to Crane

Creek Irrigation District are identical, each irrigation district getting an interest in and to said common water right, reservoir, main canal, etc.,

And Whereas, The interest of the two irrigation districts are identical in all respects save and except for the construction and completion of the distribution system for the distribution of water inside of each irrigation district wherein so far as said distribution system is concerned, neither district has any interest in the distribution system of the other,

And Whereas, Paragraph XXVII of each of said contracts between the Company and Sunnyside Irrigation District and Crane Creek Irrigation District, is identical, save and except that the amount of bond to be delivered in the contract with the Crane Creek Irrigation District is to be the sum of $75,000, $30,000 of which it is therein provided shall be by a surety company, and $40,000 by individuals, to be approved by the district; and in the contract with the Sunnyside Irrigation District, the amount of such bond is $100,000, $50,000 of which shall be of a surety company, and $50,000 by individuals;

And Whereas, Bonding companies will not write such a bond as that, when a part of the surety is to be furnished by a bonding company and a part by individuals, covering the same work,

Now, Therefore, It is mutually agreed by and between the parties hereto that the Company in lieu of the said bonds called for by said paragraph XXVII of said contracts made with Sunnyside Irri-

gation District and Crane Creek Irrigation District, shall execute good and sufficient bond in the sum of $100,000, which bond shall be given by a surety company doing business in the State of Idaho, to the Crane Creek Irrigation District and the Sunnyside Irrigation District, jointly, conditioned for the faithful performance of all the terms and conditions of each of said contracts dated August 22, 1910, between said company and said Crane Creek Irrigation District and Sunnyside Irrigation District, which contracts are herein referred to and made a part hereof, in said contracts provided to be kept and performed by the said company for the construction of the irrigation works covered by said agreements and contracts, in accordance with the plans and specifications in said contracts mentioned and the completion and conveyance within the time therein stated, as supplemented by contract of this date as to time, and for the maintenance of said system for the period of five (5) years pursuant to the conditions of said contract dated August 22, 1910.

It being mutually agreed by and between the parties hereto that said joint surety bond shall take the place of and be in lieu of said bonds called for by said paragraph XXVII of said two contracts aforesaid, and it is further mutually agreed that both the Sunnyside Irrigation District and the Crane Creek Irrigation District shall have the right of action against said bonding company for the failure on the part of the Company to perform all or any of the terms and conditions in said contracts set forth

to be performed by said Crane Creek Irrigation Land and Power Company, and that said bonds shall so provide.

It being further mutually understood and agreed that said bond shall be in such form as shall meet with the intendments of this supplemental agreement, and shall be in such form also as to meet with the approval of the Board of Directors and Ed R. Coulter, the attorney for both the Crane Creek Irrigation District and the Sunnyside Irrigation District, and shall be by him approved.

It is further mutually understood and agreed that this supplemental agreement shall not affect any of the terms and conditions of said two contracts dated August 22, 1910, save and except said paragraph XXVII of each of said contracts, and all the terms and conditions of said contract of August 22, 1910, with the exception of said paragraph XXVII as herein amended shall be and continue in full force and effect, the intendments of this contract only to vary the terms, amount and conditions of the said bond.

It is intended that this contract shall be mutually binding upon and by and between each and every and all of the parties hereto.

In Witness Whereof The respective parties hereto have caused their corporate names to be hereunto subscribed by their respective Presidents, sealed with their corporate seals and duly attested by their respective secretaries, this the day and year first

above written, pursuant to authority duly granted by resolution of their respective Boards of Directors.

CRANE CREEK IRRIGATION LAND AND POWER COMPANY,

(Seal) By E. D. Ford, its President.

Attest: E. P. Hall, Secretary.

CRANE CREEK IRRIGATION DISTRICT,

(Seal) By Chas. C. Cleary, its President.

Attest: Daisy Dasch, Secretary.

SUNNYSIDE IRRIGATION DISTRICT,

(Seal) By O. M. Harvey, its President.

Attest: Ed R. Coulter, Secretary.

The paper marked "Sunnyside Exhibit R" is contract of October 16, 1913, between Sunnyside and Crane Creek Irrigation Districts and Crane Creek Irrigation Land and Power Company, relative to escrowing the bonds of said districts. Said contract, Exhibit R, is in words and figures as follows, to-wit:

This Contract, Made and entered into in triplicate this the 16th day of October, 1913, by and between the Crane Creek Irrigation Land and Power Company, a corporation, party of the first part, and Sunnyside Irrigation District, a municipal corporation, party of the second part, and Crane Creek Irrigation District, a municipal corporation, party of the third part,

Witnesseth, That, whereas, on August 22, 1910, party of the first part and party of the second part entered into a contract in duplicate under the terms

of which party of the first part sold and agreed to construct for the party of the second part an irrigation system to irrigate the lands of the party of the second part, and the party of the second part was to pay to the party of the first part for said irrigation system in the coupon bonds of the party of the second part at their face value in an amount equal to fifty dollars ($50.00) per acre for all of the lands situated in the party of the second part, which should be irrigated and assessed for the benefits under the bonds issued and voted by party of the second part, as in said contract specifically set forth, which contract, being the contract of August 22, 1910, is hereby referred to and made a part hereof.

And Whereas, On August 22, 1910, party of the first part and party of the third part entered into a similar contract as that just last mentioned and described as being entered into between party of the first part and party of the second part, which contract of August 22, 1910, so entered into between party of the first part and party of the third part, is hereby referred to and made a part hereof,

And Whereas, Under each of said contracts so entered into by and between the parties of the first and second parts on the one hand and parties of the first and third parts on the other hand, and in paragraph VII of each of said contracts, it is specifically specified that said parties of the second and third parts should pay for said works on the monthly estimates of the work done on said irrigation system by party of the first part and upon the conveyance by party

of the first part herein to parties of the second and third parts of the same, as shown by said monthly estimate, by delivering to parties of the first part, coupon bonds of the parties of the second and third parts in face value to an amount equal to such part of the entire bond issue of the party of the second part and party of the third part to be sold and delivered to party of the first part under said contract as the constructed portion of said works so completed and conveyed as aforesaid would bear to the entire work to be constructed for the use and benefit of said party of the second part and party of the third part.

And Whereas, The total amount of bonds, face value, to be delivered to the party of the first part by party of the second part under said contract, as is shown by the assessments of benefits against the lands situate in said Irrigation District, is the sum of Five Hundred Fifty-five Thousand, Three Hundred and Eighteen ($555,318.00) Dollars,

And Whereas, The total amount of bonds, face value to be delivered to the party of the first part by party of the third part under said contract, as is shown by the assessments of benefits against the lands situate in said Irrigation District, is the sum of Two Hundred and Fifty-six Thousand ($256,000.00) Dollars,

And Whereas, a part of said irrigation system for said party of the second part and party of the third part have been completed and deeds therefor under said contract aforesaid, delivered to the party of the second part and party of the third part, the bonds

of said party of the second part and party of the third part in payment thereof have been delivered over to party of the first part, and the amount of bonds yet to be delivered by party of the second part to party of the first part, upon final completion of said works, is Three Hundred and Six Thousand, Six Hundred and Eighteen ($306,618.00) Dollars, at the face and par value thereof, and the amount of bonds yet to be delivered by the party of the third part to party of the first part, upon final completion of said work, is One Hundred and Twenty-nine Thousand ($129,000.00) Dollars, at the face and par value thereof,

And Whereas, On the 28th day of May, 1913, under said two contracts between party of the first part and party of the second part, on the one hand, and party of the first part and party of the third part hereto on the other hand, as novated, a joint indemnity bond of the Aetna Accident and Liability Company for One Hundred Thousand Dollars, guaranteeing the construction of said irrigation system, according to the terms and conditions in said bond set forth, which bond is hereby referred to and made a part hereof, was presented to the party of the second part and party of the third part by party of the first part, and by party of the second part and party of the third part approved and accepted,

And Whereas, Party of the first part has an opportunity to and is desirous of selling and disposing of, in one lot and at one time, all of the coupon bonds of party of the second part and party of the third part to which it will be entitled, and which said

party of the second part and party of the third part hereafter, under said contract of August 22, 1910, as novated, will have to pay and deliver to the said party of the first part,

Now, Therefore, In consideration of the premises and for the mutual advantage which may accrue to the parties hereto therefrom, it is hereby mutually contracted and agreed by and between the party of the first part and party of the second part on the one hand and party of the first part and party of the third part on the other hand, that the party of the second part and party of the third part shall properly sign, authenticate, register and deliver to the First National Bank of Weiser, Idaho, all of the coupon bonds of said party of the second part and party of the third part, which, under said contracts of August 22, 1910, as novated, the party of the second part and party of the third part will yet have to pay to party of the first part for said irrigation system, when completed, for the purpose of allowing said party of the first part to effect its said sale of said bonds in lump sum, and said First National Bank of Weiser is authorized and directed to deliver said coupon bonds to the party or parties to whom party of the first part has or may contract to sell the same, upon the receipt of the proceeds of the sale of said bonds which party of the first part in its said contract of sale thereof is to receive for the same from the parties to whom it is or may be selling the same, provided, of course, and upon the express condition that said proceeds of sale shall be equal to at least

sixty per cent of the face and par value of said bonds,

It being stipulated and agreed that upon receiving said moneys derived from the sale of said bonds as aforesaid, the First National Bank of Weiser shall hold the same in the name of and as the moneys of the party of the second part and the party of the third part hereto, respectively, and as trustee for them, and the same is to be paid out by said First National Bank of Weiser, Idaho, to said party of the first part, only in the amounts and at the times as authorized by the Board of Directors of the party of the second part to be at the times and in the amounts as set forth in paragraph VII of each of said contracts of August 22, 1910, by and between the party of the first part and party of the second part on the one hand and the party of the first part and party of the third part on the other hand; said payments of money so to be made by said bank to said party of the first part as authorized by the Boards of Directors of party of the second part and party of the third part as aforesaid, to be under said Section VII of said contract of August 22, 1910, and in lieu of the delivery of bonds as in said paragraph VII specified.

It is further stipulated and agreed by and between all parties hereto that this contract shall not affect any of the other terms and conditions of said contract of August 22, 1910, as heretofore set forth, and that said contract of August 22, 1910, as here-

tofore amended, shall in all other respects be in full force and effect and binding upon the parties hereto.

It is further specifically contracted and agreed that this contract of novation shall not become effective and binding upon the parties hereto until the Aetna Accident and Liability Company, a corporation, of Hartford, Connecticut, shall have delivered to the party of the second part and party of the third part, its agreement in writing, properly authorized and executed, consenting to this novation of said contract, and stipulating that this novation shall not in any respect nullify or novate the said indemnity bond for one hundred thousand dollars, dated May 28, 1913, heretofore executed and delivered by the party of the first part to the party of the second part and the party of the third part hereto.

It is further expressly provided that this contract shall not be binding upon the parties hereto or be operative or have any force or effect until the First National Bank of Weiser, Idaho, shall have executed and delivered to the party of the second part and party of the third part an indemnity bond, in form hereto attached, with sureties to be approved by the party of the second part and the party of the third part, accepting the trust obligation in this contract placed upon said First National Bank of Weiser, Idaho, and guaranteeing the faithful performance thereof, said bond to be in the sum of Two Hundred Thousand Dollars.

In Witness Whereof, The President and Secretary of the respective parties hereto have hereunto set

their hands and seals this the day and year first above written, having been thereunto duly authorized by the respective Boards of Directors.

CRANE CREEK IRRIGATION LAND AND POWER COMPANY,
(Seal) By E. D. Ford, President.
Attest: Nellie Saylors, Secretary.
SUNNYSIDE IRRIGATION DISTRICT,
(Seal) By O. M. Harvey, President.
Attest: Ed R. Coulter, Secretary.
CRANE CREEK IRRIGATION DISTRICT,
(Seal) By C. C. Cleary, President.
Attest: Daisy Dasch, Secretary.

The paper marked "Sunnyside Exhibit Q" is a contract dated November 21, 1913, between Sunnyside Irrigation District and Crane Creek Irrigation District on the one hand and Crane Creek Irrigation Land and Power Company on the other hand, for a change of depository. Said Exhibit Q is in words and figures as follows, to-wit:

This Contract, Made and entered into in triplicate this the 21st day of November, 1913, by and between the Crane Creek Irrigation Land and Power Company, a corporation, party of the first part, and Sunnyside Irrigation District, a municipal corporation, party of the second part, and Crane Creek Irrigation District, a municipal corporation, the party of the third part,

Witnesseth, That, Whereas, on August 22, 1910, party of the first part and party of the second part

entered into a contract in duplicate under the terms of which party of the first part sold and agreed to construct for the party of the second part an irrigation system to irrigate the lands of the party of the second part, and the party of the second part was to pay to the party of the first part, for said irrigation system, in coupon bonds of the party of the second part, at their face value, in an amount equal to Fifty Dollars ($50.00) per acre for all of the lands situated in party of the second part, which should be irrigated and assessed for the benefits under the bonds issued and voted by party of the second part, as is in said contract specifically set forth, which contract, being the contract of August 22, 1910, is hereby referred to and made a part hereof.

And Whereas, On August 22, 1910, party of the first part and party of the third part entered into a similar contract as that just last mentioned and described as being entered into between party of the first part and party of the second part, which contract of August 22, 1910, so entered into between party of the first part and party of the third part is hereby referred to and made a part hereof,

And Whereas, Under each of said contracts so entered into by and between the parties of the first and second parts on the one hand and parties of the first and third parts on the other hand, and in paragraph VII of each of said contracts, it is specifically specified that said parties of the second and third parts should pay for said works on the monthly estimates of the work done on said irrigation system by

party of the first part and upon the conveyance by party of the first part herein to parties of the second and third parts of the completed portion of same as shown by said monthly estimate, by delivering to party of the first part, coupon bonds of the parties of the second and third parts in face value to the amount equal to such part of the entire bond issue of the party of the second part and party of the third part to be sold and delivered to the party of the first part under said contract as the constructed portion of said works so completed and conveyed as aforesaid would bear to the entire work to be constructed for the use and benefit of the said party of the second part and party of the third part.

And, Whereas, The total amount of bonds, face value, to be delivered to the party of the first part by party of the second part under said contract, as is shown by the assessments of benefits against the lands situated in said Irrigation District, is the sum of Five Hundred Fifty-six Thousand Three Hundred and Eighty-one Dollars ($356,381.00).

And, Whereas, the total amount of bonds, face value, to be delivered to the party of the first part by party of the third part under said contract, as is shown by the assessments of benefits against the lands situated in said Irrigation District, is the sum of Two Hundred Fifty-six Thousand Dollars.

And, Whereas, a part of said irrigation system for said party of the second part and party of the third part has been completed and deeds therefor under said contract aforesaid delivered to the party of the

second part and party of the third part, the bonds of said party of the second part and party of the third part in payment therefor have been delivered over to the party of the first part and the amount of bonds yet to be delivered by party of the second part to party of the first part, upon the final completion of said works, is Three Hundred Seven Thousand, Six Hundred and Eighty-one Dollars ($307,-681.00), at the face value and par value thereof, and the amount of bonds yet to be delivered by party of the third part to party of the first part, upon the final completion of said work, is One Hundred Twenty-nine Thousand Dollars ($129,000.00), at the face and par value thereof.

And, Whereas, On the 28th day of May, 1913, under said two contracts between party of the first part and party of the second part on the one hand and party of the first part and party of the third part hereto on the other hand, as novated, a joint indemnity bond of the Aetna Accident and Liability Company for one hundred thousand dollars, guaranteeing the construction of said irrigation system, according to the terms and conditions in said bond set forth, which bond is hereby referred to and made a part hereof, was presented to the party of the second part, and party of the third part by party of the first part, and by party of the second part and party of the third part approved and accepted,

And, Whereas, party of the first part has an opportunity to and is desirous of selling and disposing of, in one lot and at one time, all of the coupon bonds

of party of the second part and party of the third part to which it will be entitled, and which said party of the second part and party of the third part hereafter, under said contract of August 22, 1910, as novated, will have to pay and deliver to said party of the first part,

Now, Therefore, In consideration of the premises and for the mutual advantage which may accrue to the parties hereto therefrom, it is hereby mutually contracted and agreed by and between the party of the first part and party of the second part on the one hand and party of the first part and party of the third part on the other hand, that the party of the second part and party of the third part shall properly sign, authenticate, register and deliver to the Commerce Trust Company of Kansas City, Missouri, all of the coupon bonds of the said party of the second part and party of the third part, which, under said contract of August 22, 1910, as novated, the party of the second part and party of the third part will yet have to pay party of the first part for the said irrigation system when completed, for the purpose of allowing said party of the first part to effect its said sale of said bonds in a lump sum, and said Commerce Trust Company of Kansas City, Missouri, is authorized and directed to deliver said coupon bonds to the party or parties to whom party of the first part has or may contract to sell the same, upon the receipt of the proceeds of the sale of said bonds which party of the first part in its said contract of sale thereof, is to receive for the same from the

parties to whom it is or may be selling the same, provided, of course, and upon the express condition that said proceeds of sale shall be equal to at least sixty (60%) per centum of the face and par value of said bonds.

It being stipulated and agreed that upon receiving said moneys derived from the sale of said bonds as aforesaid, the Commerce Trust Company of Kansas City, Missouri, shall hold the same in the name of and as the moneys of the party of the second part and the party of the third part hereto, respectively, and as trustees for them, and the same is to be paid out by said Commerce Trust Company of Kansas City, Missouri, to said party of the first part, only in the amounts and at the times as authorized by the Board of Directors of the party of the second part and party of the third part, respectively; said payments to be at the times and in the amounts as set forth in paragraph VIII of each of said contracts of August 22, 1910, by and between the partf of the first part and party of the second part on the one hand and the party of the first part and party of the third part on the other hand; said payments of money so to be made by said Commerce Trust Company of Kansas City, Missouri, to said party of the first part as authorized by the Boards of Directors of party of the second part and party of the third part as aforesaid, to be under said Section VII of said contract of August 22, 1910, and in lieu of the delivery of bonds as in said paragraph VII specified.

It is further stipulated and agreed by and between all parties hereto that this contract shall not effect any of the other terms and conditions of said contract of August 22, 1910, as hereinbefore set forth, and that said contract of August 22, 1910, as heretofore amended, shall in all other respects be in full force and effect and binding upon the parties hereto.

It is further specifically contracted and agreed that this contract of novation shall not become effective and binding upon the parties hereto until the Aetna Accident and Liability Company, a corporation, of Hartford, Connecticut, shall have delivered to the party of the second part and party of the third part its agreement in writing, properly authorized and executed, consenting to this novation of said contract, and stipulating that this novation shall not in any respect nullify or novate the said indemnity bond of one hundred thousand dollars, dated May 28, 1913, heretofore executed and delivered by the party of the first part to the party of the second part and the party of the third part hereto.

It is mutually agreed that this contract shall be in lieu of that certain contract between the same parties, dated October 16, 1913, in which the First National Bank of Weiser is named as such Trustee; and that said contract of October 16, 1914, shall no longer be operative.

In Witness Whereof, the President and Secretary of the respective parties have hereunto set their hands and seals this the day and year first above

written, having been thereunto duly authorized by the respective Boards of Directors.

CRANE CREEK IRRIGATION LAND AND POWER COMPANY,

(Seal) By E. D. Ford, President.

Attest: Nellie Saylor, Secretary.

SUNNYSIDE IRRIGATION DISTRICT,

(Seal) By O. M. Harvey, President.

Attest: Ed R. Coulter, Secretary.

CRANE CREEK IRRIGATION DISTRICT,

(Seal) By Chas. C. Cleary, President.

Attest: Daisy Dasch, Secretary.

Contracts between Crane Creek Irrigation Land and Power Company and Crane Creek Irrigation District are identical in terms and conditions with the contracts between Crane Creek Irrigation Land and Power Company and Sunnyside Irrigation District, and the plans and specifications are all identical. The only difference between the two contracts is one of percentages, due to the acreages of land in the two districts.

The original contracts, "Exhibit B" and similar contract with Crane Creek Irrigation District, contemplate interest in the system and reservoir in the proportion to the amount of acreage of land in the two districts. Since the execution of said two contracts of August 22, additional acreage has been added to each of said districts and the percentages called for in that contract are not the correct percentages.

On cross-examination the witness testified:

"That is my signature at the close of paper marked 'Maney Bros. Exhibit No. 4.' This is a certified copy of a resolution passed by the Board of Directors of the Sunnyside Irrigation District. The Crane Creek Irrigation District passed a similar resolution. I have been attorney for both districts during all of this time and the Secretary of the Crane Creek District is a stenographer in my office. I am perfectly familiar with the records of both districts. A similar resolution to that was passed by the Crane Creek Irrigation District, and a certified copy of it was given under the signature and seal of the Secretary of that district, to Mr. Ford, I think, for transmission to Maney Bros."

The exhibit referred to as "Maney Bros. Exhibit No. 4" is in words and figures following, to-wit:

"Office of the Board of Directors of Sunnyside Irrigation District, July 10, 1914.

The Board of Directors of Sunnyside Irrigation District met at the hour of eight o'clock p. m., this date, pursuant to an order of adjournment duly entered on July 7, 1914, there being present O. M. Harvey, President, August Brockman and William G. Perlau, Directors, and also all the officers and directors of the Crane Creek Irrigation District, the following proceedings were had, to-wit:

* * * * * * * *

Thereupon the following resolution was offered by Director Brockman, and upon motion

duly made, seconded and carried, was unanimously adopted:

Be It Resolved by the Board of Directors of Sunnyside Irrigation District and Crane Creek Irrigation District, in joint meeting assembled, that it is a fact that the mortgage from Crane Creek Irrigation Land and Power Company to Maney Brothers and Company, dated the 29th day of September, 1911, and recorded on the .....day of October, 1911, in Mortgage Book.... at pages..... in the office of the County Recorder of Washington County, Idaho, was duly executed and delivered by said Crane Creek Irrigation Land and Power Company to said Maney Brothers Company, after the date of the contract of August 22, 1910, between said Districts and the Crane Creek Irrigation Land and Power Company, under which the Crane Creek Irrigation Land and Power Company contracted to sell and convey unto said Districts a complete water system for the irrigation of the lands in said Districts, to be paid for by the District by the coupon bonds of said Districts at the rate of fifty dollars per acre in bonds for each acre of land in the Districts receiving a water right, but was executed and delivered to said Maney Brothers and Company before the date on which the Crane Creek Irrigation Land and Power Company made its first conveyance to the said Districts of any interests in the water rights and reservoir site covered by said mortgage.

Be It Further Resolved, That we understand that, under the correct construction of the law, the conveyances of lands and water rights covered by said mortgage, which have been made by the Crane Creek Irrigation Land and Power Company to said Districts, have been made, subject to the said mortgage lien of Maney Brothers and Company, and that said mortgage lien of Maney Brothers and Company is, so far as said Districts are concerned, a first lien upon said lands;

But, Be It Further Resolved, That, in passing this resolution, the said Districts do not waive any rights which they may have in the premises; and in the event that our interpretation of the law of the case is incorrect, it shall not be the intention of said Districts to waive or relinquish any rights which they may or might have in the premises.

* * * * * * * *

There being no further business to come before the Board of Directors at this time, on motion same adjourns, to meet the.....day of July, 1914.

O. M. Harvey, President.

Attest: Ed R. Coulter, Secretary.

State of Idaho,
County of Washington,—ss.

Ed R. Coulter hereby certifies that he is the Secretary of Sunnyside Irrigation District and as such has on file in his office the records and

files of said District. That the within pages, numbered 1 and 2, contain a true and correct copy of the resolution passed by the Boards of Directors of Sunnyside and Crane Creek Irrigation Districts, at a joint meeting held at the hour of eight o'clock p. m., on July 10, 1914.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Irrigation District, this the 10th day of July, 1914.

(Seal) ED R. COULTER."

"I prepared paper marked 'Maney Bros. Exhibit No. 5,' as attorney for the irrigation districts. The signatures attached are the genuine signatures of the Presidents of those two districts."

The exhibit referred to as "Maney Bros. Ex. No. 5" is in words and figures following, to-wit:

"*This Is to Certify*, That, on August 22, 1910, the Crane Creek and Sunnyside Irrigation Districts entered into a contract with the Crane Creek Irrigation Land and Power Company, under the terms of which the said irrigation districts agreed to purchase from the Crane Creek Irrigation Land and Power Company, and the Crane Creek Irrigation Land and Power Company agreed to sell to said irrigation districts, a sufficient interest in the reservoir, irrigation system, canals and water rights then owned and being constructed and to be constructed by said Crane Creek Irrigation Land and Power Company, sufficient to store in said reservoir, three acre feet of water for each acre of land assessed with benefits in said irrigation districts, and

sufficient interest in said canal and irrigation system to carry said water to and upon the land in said district; that in said contracts the irrigation districts agreed to pay the Crane Creek Irrigation Land and Power Company for same in coupon bonds of said districts at the rate of fifty dollars per acre for each acre of land receiving benefits therefrom and that the said contracts provided that the Crane Creek Irrigation Land and Power Company, when said systems were finished, should convey said interest to the districts free from all liens and claims of every description.

This is to further certify that said irrigation system has not yet been completed and final conveyances have not yet been made by Crane Creek Irrigation Land and Power Company to said irrigation districts for said interest in said reservoir and rights of way, water rights, etc.

It appears from the records in the office of the County Recorder of Washington County, Idaho, that there is a mortgage upon said reservoir, and other lands, in favor of Maney Bros. & Co., a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells, and it is conceded that said mortgage is a valid and subsisting lien against said lands as against the Crane Creek Irrigation Land and Power Company and said irrigation districts, and that so far as said Maney Brothers & Co. are concerned, and the said mortgage, the said

Crane Creek and Sunnyside Irrigation Districts have no defense against the same, and the conveyances that have been made to said reservoir, and the conveyances that may be made by the Crane Creek Irrigation Land and Power Company to them of the interest in said reservoir, and all conveyances which may be made prior to the satisfaction of said mortgage, will be subject to the lien of said mortgage.

Made in triplicate and signed this the 15th day of June, 1914.

CRANE CREEK IRRIGATION DISTRICT,
(Seal) By Chas. C. Cleary, President.
SUNNYSIDE IRRIGATION DISTRICT,
(Seal) By O. M. Harvey, President.

"This is my signature on the last page of Maney Bros. Exhibit No. 6. The certificate is wrong in that it says that I am Secretary of the Crane Creek Irrigation District. It should have been Sunnyside Irrigation District and I meant to execute it on behalf of the Sunnyside Irrigation District as its Secretary. The same is true in the fore part of the certificate where it recites that it was resolved by the Board of Directors of the Crane Creek Irrigation District. It should have been Sunnyside Irrigation District. These resolutions were in duplicate and I evidently signed as Secretary the one that should have been certified by Miss Beck, the Secretary of the Crane Creek District. These were passed by both districts, identical in form, and they were afterwards transmitted by me directly to Maney Bros."

The exhibit referred to as Maney Bros. Exhibit No. 6 is in words and figures following, to-wit:

"RESOLUTION.

Be It Resolved, By the Board of Directors of the Crane Creek Irrigation District, that the act of the President of this District in executing and delivering to Maney Bros. & Company in the name and for and on behalf of this District, the following certificate or agreement:

This Is to Certify, That on August 22, 1910, the Crane Creek and Sunnyside Irrigation Districts entered into a contract with the Crane Creek Irrigation Land and Power Company, under the terms of which the said irrigation districts agreed to purchase from the Crane Creek Irrigation Land and Power Company, and the Crane Creek Irrigation Land and Power Company agreed to sell said irrigation districts, a sufficient interest in the reservoir, irrigation system, canals and water rights then owned and being constructed and to be constructed by said Crane Creek Irrigation Land and Power Company, sufficient to store in said reservoir three acre feet of water for each acre of land assessed with benefits in said irrigation districts, and sufficient interest in said canal and irrigation system to carry said water to and upon the land in said district; that in said contracts the irrigation districts agreed to pay the Crane Creek Irrigation Land and Power Company for same in coupon bonds of said districts at the rate of

fifty dollars per acre for each acre of land receiving benefits therefrom, and that the said contracts provided that the Crane Creek Irrigation Land and Power Company, when said systems were finished, should convey said interest to the districts free from all liens and claims of every description.

This is to further certify that said irrigation system has not yet been completed and final conveyances have not yet been made by Crane Creek Irrigation Land and Power Company to said irrigation districts for said interest in said reservoir and rights of way, water rights, etc.

It appears from the records in the office of the County Recorder of Washington County, Idaho, that there is a mortgage upon said reservoir, and other lands, in favor of Maney Bros. & Co., a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells, and it is conceded that said mortgage is a valid and subsisting lien against said lands as against the Crane Creek Irrigation Land and Power Company and said irrigation districts, and that so far as said Maney Brothers & Co. are concerned, and the said mortgage, the said Crane Creek and Sunnyside Irrigation Districts have no defense against the same, and the conveyances that have been made to said reservoir, and the conveyances that may be made by the Crane Creek Irrigation Land and Power Company to them of the interest in said reservoir,

and all conveyances which may be made prior to the satisfaction of said mortgage, will be subject to the lien of said mortgage.

Made in triplicate and signed this the 15th day of June, 1914.

CRANE CREEK IRRIGATION DISTRICT,
(Seal) By Chas. C. Cleary, President.
SUNNYSIDE IRRIGATION DISTRICT,
(Seal) By O. M. Harvey, President.

be and the same is hereby ratified, approved and confirmed.

State of Idaho,
County of Washington,—ss.

I, Ed R. Coulter, Secretary of the Crane Creek Irrigation District, do hereby certify that the foregoing is a full, true and complete copy of the resolution passed by the Board of Directors of said Irrigation District at a meeting thereof regularly called and held on the 18th day of Aug., 1914.

In Witness Whereof, I have hereunto set my hand and the seal of said corporation, this 3rd day of Sept., 1914.

ED R. COULTER, Secretary.

Subscribed and sworn to before me this.... day of July, 1914.

.....
Notary Public."

"I have frequently talked, and I have had frequent conversations with Mr. E. G. Wells, of Maney Bros. & Co., relative to that mortgage, and know that they

held a mortgage on this property, belonging to the Crane Creek Irrigation Land and Power Company. In fact, the mortgage is a matter of record in Washington County.

"The aggregate of the first and second bond issues of the Sunnyside Irrigation District is $565,000.00. I have the data showing when these bonds were delivered by the districts and who purchased them. Where the construction work was in common for the two districts, it was paid for by the districts in the proportion of 32% by the Crane Creek Irrigation District and 68% by the Sunnyside Irrigation District. Where the works were not in common, where there was work that was entirely within one irrigation district, that irrigation district paid for the work in its entirety. Deliveries of bonds were made as follows: On April 13th, 1913, the Sunnyside Irrigation District delivered to the Crane Creek Irrigation Land and Power Company $151,000.00 of bonds, and on the same date the Crane Creek Irrigation District delivered to the same corporation $99,000.00 of bonds. These figures were all par or face value. That was the first delivery. At that time each of the districts received an estimate of the amount of work that had been done in the construction of the reservoir. A form of deed, my recollection is, was presented at that time. The deed was not formally delivered until a short time after that. The deliveries were based in part upon estimates furnished by the engineers, of the cost of the reservoir. $51,000.00 of these bonds of the Sunnyside Irrigation District

work for construction work on the reservoir, and $100,000.00 delivered on the execution and delivery of the indemnity bond called for by the terms of the contract. The Crane Creek Irrigation Land and Power Company delivered to the two districts a joint and several bond for the fulfillment of those two contracts of August 22, 1910, signed by the Aetna Accident and Liability Company of Hartford, Connecticut; and the $100,000.00 par value of bonds were delivered to the Crane Creek Irrigation Land and Power Company on account of the delivery of the indemnity bond under the terms of the contracts calling for that; and the balance of $51,000.00 of bonds were delivered on engineer's estimate showing the cost of the construction of the reservoir. $75,000.00 of the $99,000.00 of bonds delivered by the Crane Creek District were delivered on the execution of the indemnity bond, and the difference between $75,000.00 and $99,000.00 was delivered on the estimate of the engineer on the construction of the reservoir. The total amount of bonds delivered on account of the indemnity bond was $100,000.00 by the Sunnyside District and $75,000.00 by the Crane Creek District. The next delivery was on June 13, 1913. At that time the Sunnyside District delivered $21,000.00 and the Crane Creek District $5,000.00. Those deliveries were based on monthly estimates of the engineers. The next delivery was made on July 18, 1913, $28,000.00 by the Sunnyside District and $45,000.00 by the Crane Creek District. Those deliveries were based on monthly estimates of

the engineers. The next delivery was on September 17, 1913. At that time the Sunnyside District delivered $487,000.00, and the Crane Creek District $18,500.00. Those deliveries were based on estimates of the engineers. The next delivery was December 11, 1913. Now, an explanation occurs here. One of the exhibits there shows a contract of October 16, 1913, executed between all of these parties, the two districts and the Crane Creek Company, whereby all the remaining bonds were placed in escrow with the First National Bank of Weiser. Our information was that the Crane Creek Company had obtained a syndicate of bankers at Kansas City and Pittsburgh, who had agreed to take the whole issue at sixty cents on the dollar, and, for convenience, and to meet with the demands of that syndicate, all the bonds were escrowed with the bank, and with the agreement that as the monthly estimates came in from the engineer and were allowed and approved by the districts, that the districts, in lieu of actual delivery of bonds to the Crane Creek Irrigation Land and Power Company, give them orders upon this bank, trustee, to pay the money proceeds of the bonds, or, if they hadn't been sold, in lieu of the proceeds, to pay them the bonds direct; and this contract was again subsequently changed by the contract of November 21, 1913, which is also one of the exhibits, and under this contract the trustee was changed from the First National Bank of Weiser to the Commercial Trust Company of Kansas City, Missouri, under the same terms and conditions. There

were two estimates allowed and approved on December 11, 1913, and on that date the Sunnyside Irrigation District gave to the Crane Creek Irrigation Land and Power Company an order upon the Commercial Trust Company of Kansas City, Missouri, to pay to the power company the sale proceeds of $38,-300.00 of the coupon bonds at sixty cents, under that contract of November 21, 1913; and on the same date it gave another order to the same party on the Commercial Trust Company for the sale proceeds of $19,-964.00 of the bonds; and on the same date the Crane Creek Irrigation District gave two similar orders to the power company on the Commercial Trust Company, one for $16,623.00 and the other for $2,838.00. Those orders were based on the monthly estimates of the engineers. There were no deliveries between September 17, 1913, and December 11, 1913. It was during this time that Mr. Ford and Mr. Slick and others were in the east making arrangements to get the bonds sold, or were re-financing. The next delivery was made January 10, 1914; Sunnyside delivered an order for the proceeds of $27,842.00, and Crane Creek for the proceeds of $5,253.00, on the same basis as before, sixty cents on the dollar. The next delivery was made February 4, 1914; the Sunnyside District delivered $12,963.66 in bonds and the Crane Creek $5,031.08. That was the amount of the estimate. The bonds at that time, as at the previous deliveries, were held in escrow by the Commercial Trust Company under an escrow agreement between the districts and the Crane Creek Irrigation Land

and Power Company, and the orders were to pay the proceeds of so many dollars of bonds, as shown by the engineers' estimates, at the rate of sixty cents on the dollar. The next delivery was made on March 3, 1914, $31,235.00 by the Sunnyside District and $13,230.00 by the Crane Creek. That was the proceeds of that much of the bonds at par value, and the procedure was the same as at the previous delivery. The next delivery was April 1, 1914, Sunnyside for the proceeds of $69,390.00, and Crane Creek for the proceeds of $32,650.00 of the bonds. The next delivery was May 5, for the proceeds of $33,335.00 of the bonds by Sunnyside, and $26,675.00 by Crane Creek. The procedure was the same as on the previous estimates. On June 6th, Sunnyside, $49,100.-00; Crane Creek, $15,700.00, based on engineers' estimates, and the proceeds were delivered by the escrow holder. The next delivery was on December 28th, 1914, and the amount was $7,000.00 by Sunnyside, and $2,000.00 by Crane Creek. Before this delivery the Commercial Trust Company had returned to the First National Bank of Weiser all the bonds that had not been sold. They still held a balance of cash on hand belonging to the districts, and this last order, as I recollect it, was given in duplicate, that is, it was given to the two banks as trustees. But the procedure was the same. That was for an estimate that had not been presented to the Board. It was not presented until December. All the bonds of the two districts have not been delivered. The Crane Creek Irrigation District still has on hand

and undelivered $9,017.62, bond value at par, and the Sunnyside has $26,170.24. Those bonds are held by the districts under the provisions of those contracts of August 22, 1910, as amended; when the Crane Creek Irrigation, Land & Power Company shall have completed its contract they will be entitled to the delivery of the remainder of those bonds."

E. D. Ford, a witness on behalf of the cross-defendants on cross-examination testified as follows:

"The first construction work done on the Crane Creek project after I entered into the contracts with the Districts was in October, 1911; that was done by Maney Bros. and that consisted of the building of the dam at the reservoir site. No work has been done on that dam in the way of construction since that time. The mortgage to Maney Bros. was given in connection with that work. The dam is across Crane Creek. The water is turned out of the reservoir and it flows down Crane Creek for some distance. It is then taken out of Crane Creek at the point marked on Sunnyside "Exhibit B" as the point of diversion. That is where Slick Bros. Construction Company commenced their work. I discussed with the two districts and their Board of Directors from time to time the financial arrangements that were made from time to time and the failure of those who contracted to buy the bonds to take them as they had agreed, and the difficulties that resulted from that. I kept the districts fully advised of my progress and of the negotiations and contracts that I made for the construction of these works and for the sale of these

bonds, and it was because of those negotiations and those contracts that I got extensions from time to time from the districts for the completion of these works. I advised the districts of the giving to Maney Bros. of that mortgage on the system about the time it was given. During the spring and summer of 1913, and frequently thereafter, I had conferences with Maney Bros. about the taking up of their mortgage. They were pressing for payment most of that time. They were going to foreclose during the spring, or the early spring of 1914, and I took those matters up with the district with the view of getting certain statements from the districts recognizing Maney Bros. mortgage. Maney Bros. Exhibit No. 6 is a resolution that I prevailed upon the districts to execute in order to get certain concessions from Maney Bros. At different times I undertook to renew underlying mortgages covering certain farm lands embraced in the Maney Bros. mortgage, and in order to renew those mortgages I had to obtain the consent of Maney Bros. to subordinate their mortgage to the new mortgage. I got the following letter from Maney Bros.:

July 17, 1914.

Mr. E. D. Ford,
Weiser, Idaho.

Dear Sir:—

At the request of Mr. Wells, we enclose consent to subordinate Maney Bros. mortgage to the new mortgage on the land formerly held by J. A. Derig, this to become effective and to be delivered only upon the passage by the two irrigation districts of the resolu-

tions herewith enclosed. If the districts decline to pass these resolutions you will return all papers. If the resolutions are passed, please have the Secretaries of the two districts certify two of the copies, one for each district, and return to us, keeping the other copies for their files. Please also send us a copy of the agreement which Mr. Wells has signed, and which we are returning herewith.

Very truly yours,

RICHARDS & HAGA."

"The resolution which is marked 'Maney Bros. Exhibit No. 6' is one of the resolutions that was enclosed in that letter, and I presented those resolutions to the districts and the districts passed them in their board meetings."

A series of deeds from the Crane Creek Irrigation Land & Power Company to the Crane Creek Irrigation District numbered from 1 to 13, inclusive, and from the same Company to the Sunnyside Irrigation District numbered from 1 to 13, inclusive, were introduced in evidence by the cross-defendants. The first deed to each district was dated May 29th, 1913, and the last deed bears date August 15th, 1914, none of which deeds were recorded except the first deed to each district, which was recorded on the 19th day of November, 1914. The deeds referred to were substantially the same except as to the description of the properties embraced therein and the percentages conveyed to the districts.

The first deed to the Sunnyside District is in words and figures following, to-wit:

"WARRANTY DEED.

This Indenture, Made the twenty-ninth day of May, in the year of our Lord one thousand nine hundred and thirteen, between Crane Creek Irrigation Land & Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, the party of the first part, and Sunnyside Irrigation District, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Idaho, party of the second part.

Witnesseth, That for and in consideration of $151,000.00, lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, by these presents does grant, bargain, sell, convey and confirm, unto said party of the second part, and to its successors and assigns forever, all the following described real estate, situate in the County of Washington and State of Idaho, to-wit:

An undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to that certain permit number 1720, issued by the State Engineer of the State of Idaho, under date of December 16th, 1905, to one Edwin D. Ford, and recorded in Book 6 at page 1720 of the record in said State Engineer's office at Boise, Idaho, and those certain permits issued by said State Engineer to Edwin D. Ford and numbered 6830 and

6834 respectively, and heretofore conveyed to the Company together with a like proportion of all the water thereby appropriated and all rights acquired under said permits; also forty-seven and two-tenths per cent. (47.2%) of the right of all flowage through the Northwest quarter of the Northeast quarter and the North half of the Northwest quarter of Section 19, Township 12 North, of Range 2 West of Boise Meridian in Idaho; and also forty-seven and two-tenths per cent. (47.2%) of the right of flowage through the Northeast quarter of Section 24, in Township 12, North, of Range 3 West of Boise Meridian in Idaho, heretofore conveyed to the company, to Grantor by Edwin D. and Hortense A. Ford, under date of May 9, 1910.

An undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to, all and singular, such right of way for canals, flumes and laterals as may be used in common by the Grantor and Grantee herein, and the Crane Creek Irrigation District acquired by the Grantor by purchase or by filing maps thereof as required by the regulations of the general land office of the United States and the acts of Congress in relation thereto, including an undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to said reservoir site, described in the certain indenture dated May 9th, 1910, between Edwin D. and Hortense A. Ford and the Grantor herein, which said indenture is of record in Book 26 of Deeds

at page 413 of the records in the office of the County Recorder of Washington County, Idaho.

An undivided forty-seven and two-tenths per cent. (47.2%) interest of, in and to, all completed portions of all canals, pipe lines, flumes, and aqueducts situated wholly within the boundaries of said irrigation district and as shown upon the plat attached to that certain contract in writing between the parties hereto, dated the 22d day of August, 1910.

All and singular, the completed portion of all main canals, distributing laterals, pipe lines, and flumes situate wholly within the boundaries of said irrigation district, and the same appear upon the plat above referred to, including rights of way for the same.

Hereby reserving unto party of the first part the sole right to use and enjoy all waters stored in said reservoir in excess of seventy thousand six hundred seventeen (70,617) acre feet; also reserving unto party of the second part the exclusive right to use the water impounded in said reservoir including the water hereby conveyed to party of the second part for the purpose of developing power provided the same shall not thereby be diminished in quantity or quality.

It is covenanted and agreed that this conveyance, when all the work completed in that agreement between the parties hereto, dated August 22d, 1910, and the extensions and amendments

thereof shall have been fully completed and performed, which said final conveyance shall contain particular and accurate descriptions including the courses and distances of rights of way for canals, and the canals, dams and other works, and a detail description of the reservoir site.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said party of the first part.

To Have and to Hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the party of the second part, and to its successors and assigns forever. And the said party of the first part, and its successors, the said premises in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against the said party of the first part, and its successors and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will *Warrant* and by these presents forever *defend.*

In Witness Whereof the party of the first part has caused its corporate name to be hereunto subscribed by its president, and these presents to be sealed with its corporate seal, duly attested by its

secretary, being thereunto duly authorized, all on the day and year first above written.

CRANE CREEK IRRIGATION LAND & POWER COMPANY,

(Seal) By E. D. Ford, Its President.

E. P. Hall, Secretary.

State of Idaho,
County of Washington,—ss.

On this 31st day of May, in the year 1913, before me, B. S. Varian, a notary public in and for said County of Washington, personally appeared E. D. Ford, known to me to be the president of Crane Creek Irrigation Land & Power Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I hereunto set my hand and affix my official seal, the day and year in this certificate first above written.

(Seal) B. S. VARIAN,
Notary Public.

James H. Hawley, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Richards:

Q. Governor, what is your business?

A. I am an attorney at law, and have been engaged in the practice of law in this state for over forty years.

Mr. Varian: We will admit his qualifications.

Q. I call your attention, Mr. Hawley, to the bill of complaint and the answers of the Portland Wood

Pipe Company, to foreclose a lien covering a little over $10,000.00, and I ask you what would be the reasonable compensation for counsel in the foreclosure of that lien, taking into consideration the preparation of the bill, procuring the order for service upon twenty-five or thirty defendants, looking after the service upon those defendants, and preparing for the trial, involving the introduction of quite a large amount of testimony, so far as exhibits are concerned, and involving about $10,000.00, and including the trial and the final disposition of the matter, preparing briefs and arguing the matter at the close of the case.

A. I would think ten per cent on the amount, $1,000.00, would be a very reasonable fee.

Q. Calling your attention to a cross-bill to that bill which I just showed you, of Maney Brothers & Company, for the foreclosure of a mortgage involving about $38,000.00, and the answers to that bill. The answers in a measure admit a large portion of it, but it involves the presentation of the main facts and the preparation of the case. What in your judgment would be a reasonable compensation for the foreclosure of that mortgage, involving something over thirty-eight thousand dollars?

A. Under the circumstances as you give them, as I understand them, I think about $2,500.00.

Q. Calling your attention to the cross-complaint of the Slick Brothers Construction Company in that same proceeding, which involves the foreclosure of a mechanic's lien totaling about $81,000.00, which

$81,000.00 includes, however, the Portland Wood Pipe Company claim of $10,000.00, and which involves the numerous answers thereto attached, and involves the preparation of the case, which is quite complicated, and the trial; the introduction of the testimony and exhibits, however, in the one case of the Portland Wood Pipe Company being the same exhibits as in this case, I ask you what would be a reasonable compensation for the foreclosure of that lien?

A. I think about five per cent, speaking in round numbers, which would be about $4,000.00.

Cross-Examination by Mr. Varian:

Q. Taking into consideration, Mr. Hawley, the fact that the same counsel represent the original plaintiff, which is the material man, or company, furnishing materials, practically, as I remember it, not altogether, not more than three invoices, and also the mortgage cross-complainant, and also one of the construction companies, cross-complainant, all made defendants in the original bills, and these cross-bills, at least one of them involving the account of the original claimant as a material man for the contractor, supplying material to the contractor, would you say in such a state of the case that the entire amount for the whole business would be reasonable in the sum of $6,000.00 or $7,500.00?

A. I think it would; in fact I was taking into consideration the fact, as I understood it, that there were three distinct suits in the first place, and that they were connected together to a certain extent, each involving its own separate facts to a certain extent, and

each involving separate inquiries on the part of the attorney, and, taking all those things into consideration, the time necessarily spent in the preparation of the pleading and in the investigation, which would make a difference in my estimation than if the full $120,000.00 had been included in the one suit in the first instance. As I understand the question, there is about $120,000.00 involved.

Q. If the subject matter of the cross-bills is substantially the same, and the evidence upon one is largely applicable to the evidence in proof of the other, and if the mortgage suit was predicated upon the same contracts with the owners of the property, or the owner of the property, or the person interested in building the property, would not that make some difference?

A. Yes, I think it would, and I have taken that into consideration in making my estimate, and I have taken into consideration in my estimate or statement my own practice and what I charge under similar circumstances.

Q. And you make your own charges regardless of other people, do you not; you make your own charges in your business, regardless of other people?

A. I do. If I have no distinct contract, I charge what I think is correct. Sometimes those things are done by contract, of course.

Q. There is nothing very intricate in the matter of preparing a mechanic's lien

A. No, not as a general proposition.

Q. It requires no exceptional knowledge or ability to do that?

A. Possibly not. I have found in certain cases that it requires a great deal of careful examination both of law and of fact.

Q. You do not estimate the value of services in searching records in the same way that you estimate the value of a lawyer's legal services? Those services are performed by clerks and abstracters.

A. No. I would not put the work of clerks and abstracters on the same footing as the services of a lawyer who was competent to attend to a suit of that magnitude, but I would take into consideration the fact that the attorneys had to go over this same matter possibly even after it had been prepared by careful abstracters, the physical work involved, which, of course, would be done by the abstracter.

Q. In building contracts, or in contracts against builders, or persons who are erecting structures and completing works, the matter of the estimates and the values are determined as a rule by other people than the lawyers, and they accept their conclusions. You don't charge for that in the same way you would for legal services?

A. No, except the work involved in ascertaining the correctness of the conclusions, because I don't think any of us have found in our experience, when large sums are involved, or great interests involved, that we take the word of anybody except as to the figuring perhaps.

Q. I show you one of these cross-bills here, or at least a copy of it, which is principally made up of exhibits, contracts, copies of contracts, copies of the lien, all of which work, we may assume, is done by other people than the lawyers in the case, so the magnitude of that kind of service, however great it may be, would be determined as being in the nature of clerical work and not legal work.

A. If that is intended as a question, I should say it would be a combination of both, and while much of the work would be clerical work, it would require careful thought on the part of the attorney. I am judging these matters without any thorough understanding, Judge Varian, as to the real facts, but with a somewhat slight understanding in regard to it as conveyed by the attorneys, and basing my estimates upon that.

Q. Now as to the amounts involved, dependent upon the interpretation of contracts and the evidence of work done and performed, as well as omitted, does that matter weigh heavily with you in making your estimates, depending upon the amount?

A. Yes, sir. If I understand the question correctly, it would make a very marked difference; that is, in other words, the responsibility of assuming the control of litigation involving very large amounts of money should be paid for at a much greater rate than the responsibility of taking charge of a suit possibly involving the same principles but a much smaller sum. It is the responsibility that I think is one of the factors that should enter into the question of the

consideration of a fee on the part of an attorney. It might not call for any more physical work to undertake a foreclosure with $100,000.00 involved than where there is $1,000.00 involved, but from my standpoint it would look ridiculous to charge the same fees. The very fact of the importance of the suit would weigh upon the attorney and cause him to investigate far more carefully.

Q. Do you think that ten per cent is a reasonable amount for foreclosing a $10,000.00 mechanic's lien claim, which is also embraced in one of the other cross-bills in the suit, and which is prosecuted by the same counsel?

A. I think $1,000.00 is a reasonable figure, that is, ten per cent. for the $10,000.00. However, if it was incorporated in another suit, and all of that, that would all depend.

Q. I say it is incorporated, as stated by Judge Richards, in one of the cross-bills in the case, by a contractor to whom this material was furnished, so there is practically an element of a double charge somewhere between the original bill and the cross-bill. What do you say about that?

A. I would say this, that I believe ten per cent would be a reasonable fee for the $10,000.00. That I think that when we come to a large amount, anything over $50,000.00, say like $80,000.00, that a lawyer trying to do what was right and be reasonable in his charges, should charge in the neighborhood of five per cent. If one was incorporated in the other, it might make a reduction in the amount, to be taken

out of the last fee, taking into consideration, however, the fact that it involved the dual set of papers, and possibly a dual examination. A man would want to be thoroughly conversant with the facts, the labor involved, and the responsibility assumed, before he would want to positively answer.

Q. What is your answer to my question, where, as in this case, the Portland Wood Pipe Company, the original plaintiff here, filing the original bill, has a claim in round numbers of about $10,000.00, for which you say counsel ought to receive $1,000.00, but which is also embraced in the cross-bill of one of the defendants to the suit, a contractor with whom the plaintiff dealt and to whom the material furnished by the plaintiff was furnished. Based upon the amount of the alleged claim, eighty odd thousand dollars, which includes the ten thousand you have already fixed a fee for, or at least given an opinion or judgment upon, would you say under those circumstances that for the original bill an attorney should receive the same amount as he would if he brought the suit alone?

A. I think that under those circumstances probably out of the larger suit in which it was incorporated he should deduct that amount of the five per cent, unless there were other matters involving dual labor leading up to it.

Q. You think there ought to be some difference made?

A. Oh, yes, that is, under ordinary circumstances.

Mr. Varian: That is all.

ORDER SETTLING STATEMENT.

The within and foregoing statement of evidence being tendered to me for settlement and allowance, and it appearing to me that said statement was lodged in due time with the Clerk of this Court, and that notice of such lodgment and of the time of the proposed settlement was given by Maney Brothers & Company, through their solicitors, to all parties to said appeal, and all amendments and objections having been considered, and the statement with such amendments as have been allowed having been duly engrossed, *It is certified* that said statement is in all respects true, complete, correct, properly prepared, and contains a full transcript of the evidence reduced to narrative form pertaining to the issues raised by the Assignment of Errors.

Dated August 23, 1915.

FRANK S. DIETRICH,
District Judge.

Filed August 23rd, 1915.

(Title of Court and Cause.)

Memorandum Decision on Claim of Plaintiff for Lien, and Maney Brothers' Mortgage.

May 17, 1915.

Richards & Haga, Attorneys for Plaintiff, Defendant Slick Bros. Construction Co., and Maney Bros. & Co.

C. S. Varian and E. R. Coulter, Attorneys for Irrigation Districts.

B. S. Varian, Attorney for Crane Creek Irrigation, Land & Power Co.

DIETRICH, DISTRICT JUDGE.

The suit was commenced by the Portland Wood Pipe Company, as plaintiff, to foreclose a mechanic's lien for material furnished to the defendant Slick Brothers Construction Company, for the construction of an irrigation system in Washington County, Idaho, against Slick Brothers Construction Company, a corporation, the Crane Creek Irrigation, Land & Power Company, a corporation, Maney Brothers & Company, a corporation, and others, including the Crane Creek Irrigation District and Sunnyside Irrigation District, irrigation districts organized under the laws of Idaho, as defendants. Briefly stated, the facts out of which the controversy has grown are, that, in August, 1910, the defendant Crane Creek Irrigation, Land & Power Company, reciting that it was the owner of certain water rights, a reservoir site, and rights of way for canals upon which certain construction work had been done, entered into separate contracts with the two defendant irrigation districts, under the terms of which it was to complete the construction of the reservoir and canals as called for by plans and specifications attached, and, with certain reservations, to make conveyance thereof in undivided interests to the two irrigation districts severally, for the permanent ownership and use by them for the irrigation of the lands which they embrace. In payment for the system when and as the same should be completed the districts agreed to turn over to the Power Company

their several coupon bonds at their face value to the amount of the specified purchase price. In some of their features the contracts are unusual, and are probably to be accounted for by the fact that under the laws of the state, as they existed at the time of the execution of the contract, irrigation districts were authorized to dispose of their bonds only by a sale for cash to the highest bidder or by an exchange thereof at par for irrigation works; they could not use them in payment for construction work. Such is the view taken by the Supreme Court of California of a law of that state, of the same general purpose and scope. *Hughson v. Crane*, 115 Cal. 404; 47 Pac. 120. The same court later held that it was competent for districts to enter into contracts for the purchase of systems to be constructed. *Stowell v. Rialto Irr. Dist.*, 155 Cal. 215; 100 Pac. 248. It is to be inferred that the contracts here were drawn to conform with the views expressed in these decisions.

The Power Company entered into a contract for construction work on the system with Maney Brothers & Company, and later with Slick Brothers Construction Company for the completion of the system. It settled with Maney Brothers by the execution of a note for a large amount, secured by a mortgage upon the system only a small part of which was then completed, and with Slick Brothers Construction Company by a written agreement, pursuant to which it was to deposit with a trustee certain bonds and securities, the proceeds of which were to be paid out to creditors in the manner therein provided. At the

time this suit was commenced there was due to Maney Brothers, on account of the mortgage note, $35,986.10, with interest thereon at the rate of six per cent from December 27, 1913. According to the contention of Slick Brothers Construction Company, there was also due to it a large balance, for which it had filed notice of mechanic's lien, which it sought to foreclose in this suit. At the close of the trial I held that the Power Company had substantially complied with the agreement of settlement by placing the bonds and other securities in the hands of the trustee agreed upon, and therefore denied relief to Slick Brothers. Admittedly there is due to the Plaintiff, the Portland Wood Pipe Company, $10,317.44, which is the basis of the lien upon which the complaint is predicated.

The system was completed, and in accordance with the contract between the irrigation districts and the Power Company it was conveyed in separate shares to the districts, and at the time the suit commenced they were the owners of the legal title thereto. As already stated, there is no controversy as to the amount due from the Power Company to Maney Brothers, or from Slick Brothers Construction Company to the Portland Wood Pipe Company, but the irrigation districts contend that they hold the property free from both the mortgage and the plaintiff's claim of lien.

First disposing of

The Lien Claim of the Portland Wood Pipe Co.

Briefly stated, the districts' contention is that they

are municipal corporations, that their property is dedicated to public uses, and that therefore it is exempt from the operation of the mechanic's lien laws of the state. It is argued that while Section 5110 of the Revised Codes in general terms confers the right of lien upon any person performing labor upon or furnishing materials to be used in the construction of any work, the section is not to be deemed to extend the right of lien to property belonging to the state or municipal corporations. Attention is called to Section 5111, which expressly provides for a lien in favor of sub-contractors, laborers, and persons furnishing material (but not original contractors), in case of structures belonging to "any county, city, town, or school district," and to still another provision of law by which contractors are required to furnish bonds to municipal corporations, including irrigation districts, to indemnify not only the corporation, but also any person furnishing labor or material, and the conclusion is drawn from the several provisions that the legislature did not intend to provide for a lien in favor of either a material man or a laborer in the case of structures or improvements belonging to an irrigation district. It would be strange for the legislature to extend the right of lien to buildings and other property belonging to a county, city, town, or school district, and withhold it in the case of an irrigation district; and it is difficult to believe that such was the intention. But that question is not involved here. The material furnished by the plaintiff was for the construction of works be-

longing to the Power Company, not to the irrigation districts. It is true that the system was to be conveyed to the irrigation districts, but doubtless as they understood the law they could not contract to pay bonds for the construction of irrigation works, and they therefore intended that the construction should be for the Power Company, and that they would buy the completed structures. That being the case, they took title subject to such liens as incumbered the property when it came into the possession and ownership of the Power Company, and very clearly the Power Company acquired title to the property subject to the liens of the workmen who built it and the material men who furnished the material for its construction. *Greer v. Cache Valley Canal Co.*, 4 Idaho, 280; 38 Pac. 653. *Garland v. Irrigation Company*, 9 Utah, 350; 34 Pac. 368; 163 U. S. 687. *Fosdick v. Schall*, 99 U. S., 235. *Holt v. Henley*, 232 U. S. 637. The districts will not be permitted to take a position now inconsistent with that which they maintained at the time this material was furnished. It may be assumed that before the plaintiff furnished the pipe material it made inquiry and learned the nature of the contract between the Power Company and the irrigation districts, and was thus advised that the irrigation districts did not claim that they owned the property, or that the Power Company was merely a construction company. There is no contention here that the districts required the Power Company to give a bond, which was their bounden duty to do if it was deemed to be a construction company. Un-

doubtedly the irrigation districts held out to the world that they were merely the purchasers of this property, and were not engaged in its construction. They cannot now be permitted to change their position, to the hurt of persons who in good faith dealt with the Power Company as the owner of the property.

I reject the suggestion that inasmuch as Slick Brothers Construction Company entered into the contract of settlement already referred to, with the Power Company, and thus waived its lien, the right of the plaintiff was thereby cut off. The statute confers upon the material man an independent right to a lien of which he cannot be divested without his consent.

The Maney Brothers Mortgage.

We now come to a consideration of the validity and dignity of the Maney Brothers mortgage. There is no dispute that there remains due thereon a balance of $35,986.10, besides interest from December 27, 1913, at the rate of six per cent per annum. The Power Company, mortgagor, makes no resistance, and the only defense is that interposed by the irrigation districts, which contend that under their contract of purchase and the subsequent deeds made in pursuance thereof, they took an unincumbered title to the property. As already stated, the contract of purchase was executed on August 22, 1910, whereas the mortgage was not made until September 29, 1911; and the deeds were all executed at still later dates. Presumably a question having arisen as to the

status of the mortgage lien, the mortgagees on July 10, 1914, procured the passage of a resolution, at a joint meeting of the boards of directors of the two districts, expressing the view of the boards that the title received by the districts was subject to the mortgage, but there was appended an express disclaimer of any intention to waive any rights which the districts then possessed. It is scarcely necessary to observe that with this proviso the resolution did not even purport to enlarge the rights of the mortgagees. Later, namely, on August 18, 1914, the boards of directors, acting separately, passed a resolution ratifying a certificate executed by the president of each district, dated June, 1914, certifying to certain undisputed facts touching the history of the transaction and purporting to concede that the mortgagees' rights were superior to those of the districts. But both the certificate and the subsequent ratification were without consideration, and even were it to be assumed that an irrigation district may be estopped by the unauthorized acts of its officers, there were wanting here some of the essential elements of estoppel. I am therefore clearly of the opinion that both the resolutions and the certificates must be laid aside as having no efficacy whatsoever.

There remains the general question whether the transfer consummated by the deeds delivered from time to time as portions of the system were completed, relates back to the date of the contract and cuts off the intervening mortgage lien. It is conceded that for certain purposes at least this doctrine

of relation is to be recognized, but it is not to be given effect here, it is argued, because it would work an injustice and it is never invoked where such would be the result. The supposed injustice lies in the fact that if the mortgage is defeated the mortgagor may be unable to recover all of the mortgage debt. The gist of the contention seems to be that in case of an executory contract for the sale of real property the vendor retains the power to transfer the legal title to a third person or subject it to a lien, and in such cases the transferee or mortgagee is subrogated to the rights of the vendor, and is entitled to receive the unpaid portion of the purchase price. Specifically it is urged that the mortgage lien here attached to the unpaid purchase price, and that the districts having notice, both constructive and actual, of the existence of the mortgage, paid the Power Company at their peril. But the application of the principle to the facts in hand is not so plain or simple. The contract in question was for the purchase of an indivisible unit of property. No substantial part of it was in existence at the time the contract was made; it was largely to be created before it could be transferred. Admittedly, when completed it was to be conveyed free from all incumbrances. What then were the rights and duties of the districts? Clearly it was their right to take such course as was reasonably necessary to secure the performance of the contract, and, as already stated, one of the provisions of the contract was that they should receive title to the completed system free from incumbrances, of which con-

dition mortgagees at all times had knowledge. Now what in fact did they do? So far as the record shows, they paid the purchase price by turning their bonds over to the Power Company to be used by it in procuring the construction of and title to the property conveyed by the contract, and the bonds were so used. In view of the record, it is idle to talk about withholding the purchase price and applying it to the discharge of the mortgage indebtedness. Had such a policy been suggested at the outset the contractors would doubtless have declined to proceed with the work, and if it had been adopted after the work was done mechanic's liens would have been asserted against the property. That the lien of those who, by supplying labor and material, created the property, was superior to the equity of the districts, I have already held, and that it was superior to the mortgage lien is scarcely open to controversy. Under such circumstances, it was the right of the districts to see that the purchase price was applied to the discharge of the superior liens; those of contractors, laborers, and of material men. If we assume that thereafter it was their duty to withhold from the vendor and pay to the mortgagees the balance, it need only be said that there is no showing that there was any balance. So far as appears none of the bonds constituting the purchase price has been turned over to or retained by the Power Company for its own profit.

It is now quite immaterial that the mortgage indebtedness originated in construction work done by

the mortgagees upon a branch of this irrigation system. If we assume that up to the time they took the mortgage their right to a mechanic's lien remained unimpaired, they abandoned that right by taking the mortgage. It may very well be true that if they had then insisted upon such a lien the project would have fallen through and they would have been left with worthless security. But however that may be, and whatever may have been their motives, they waived their statutory lien and took the mortgage, and their status here is that of a mortgagee and nothing more.

There is this further consideration: The districts, as we have seen, were under no obligation to pay the Power Company money; the price was to be paid in bonds. If the mortgagees were resting upon the theory that as holders of a mortgage they were in a sense subrogated to the right of the Power Company to receive the purchase price, why did they not demand that a part of the purchase price be turned over to them? They apparently knew that the bonds were being delivered, and yet made no demand or protest. Great difficulty was experienced in negotiating the bonds even at heavy discounts. From the record can we say that the mortgagees would have been willing to take them at their face value or for that matter at any price? Upon their own theory, their mortgage at most conferred upon them a conditional right to receive a part of the unpaid purchase price. But the purchase price consisted not of money but of bonds, and at no time during the entire trans-

action did they intimate a willingness to accept bonds, nor up to the present time have they manifested such willingness. They are insisting upon the payment of their claim in money. As against their debtor, the Power Company, such is their right, but in no view of the law, upon any state of facts either real or assumed, was it ever the duty of the districts to pay them any part of their demand in money. In view of these considerations it is thought that the lien of the mortgage does not extend to such property rights and interests as were covered by the contract and have been conveyed to the districts pursuant to the terms thereof. A foreclosure will therefore be granted only as to the other property described in the mortgage, including the interest reserved by the Power Company in the irrigation system.

As to attorney's fees, possibly the amount testified to, namely, $1,000.00, would not be excessive for the Portland Wood Pipe Company, if counsel who represent it were not otherwise employed in the case, but taking into consideration the fact that the same counsel also represent the mortgagees and Slick Brothers, I am inclined to think $750.00 will be an adequate allowance on this account. As to Maney Brothers, their principal controversy, namely, that their lien extends to the property of the irrigation districts, is found to be without valid basis, and insofar as the legal services pertain to that controversy, they must themselves bear the expense. For other services they are entitled to recover, and $1,000.00 will be awarded on account thereof.

My conclusion as to the Slick Brothers claim was announced orally. As to the Comerford claim, after a ruling upon the controlling questions, I am advised of a complete settlement between the interested parties. Both the cross-complaint and the counter-claim will therefore be dismissed as settled.

Counsel for the plaintiff will draught form of decree and submit the same to other counsel in the case.

Filed May 17, 1915.

(Title of Court and Cause.)

DECREE.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was *Ordered, Adjudged and Decreed* as follows, viz:

1. That the defendants Idaho National Bank, a corporation, C. R. Shaw Wholesale Company, a corporation, Utah Fire Clay Company, a corporation, Pete March, G. A. Heman, J. M. Pinckard, F. A. Squier, Jim Mirehouse, Guy Comerford, Wm. R. Comerford, James M. Magee, C. A. Smith, J. L. Smith, George F. Smith, Claud F. Smith, A. T. Schwab, A. L. Chenoweth and George C. Cater have no interest, lien, claim, or demand on or against the irrigation works, water rights, canals, structures, lands and premises hereinafter described, or any part thereof; and plaintiff's said Bill and the several cross-bills filed herein are dismissed as to H. H. Begley, Henry Whitmore, L. F. Easton, J. C. Toney, Thomas

Sherry and E. H. Hasbrouck, originally made parties defendant in this cause.

2. That the defendant and cross-complainant S. C. Comerford take nothing by his cross-complaint herein, and the cross-bill of said S. C. Comerford is hereby dismissed.

3. That said Portland Wood Pipe Company do have and recover from the defendant Slick Brothers Construction Company, Limited, the sum of $9,733.94 with interest thereon at the rate of eight per cent. (8%) per annum from the 24th day of June, 1914, and the sum of $6.60 for recording mechanic's lien filed by said plaintiff and described in its bill of complaint, and the further sum of $750.00 attorney's fee, making in the aggregate the sum of $11,244.30, together with its costs of suit, taxed at $137.60.

4. That the said plaintiff Portland Wood Pipe Company is entitled to and has a first charge and lien for the security and payment of the above sums of money upon all the right, title, and interest of the defendants Sunnyside Irrigation District and Crane Creek Irrigation District in and to the following described property:

(a) That certain reservoir and reservoir site situated in Township Twelve (12) North, Range Two (2) West, B. M., Washington County, Idaho, application for right of way for which was filed in the United States Land Office at Boise, Idaho, by one E. D. Ford on the 3rd day of September, 1907, and which said application was approved by Thomas

Ryan, Acting Secretary of the Interior, on the 26th day of October, 1907; and which said reservoir and reservoir site is more particularly described in said application and on the duplicate map filed in connection with said application and kept on file in the United States Land Office at Boise, Idaho, and the same for which said reservoir is situated in the Southeast Quarter (SE¼) of the Southeast Quarter (SE¼), Section Nineteen (19) of said township and range; and all lands situated within said reservoir site, including the right of way secured as aforesaid from the Government of the United States.

(b) All canals, ditches, headgates, flumes, pipe lines, laterals, and other structures, dams and works used, or intended to be used, or required in connection with the distribution of the water from said reservoir and carrying and distributing said water to the place or places of intended use; and all rights of way therefor, and particularly that certain canal on the southerly side of Crane Creek and crossing the west boundary line of the Crane Creek Irrigation District near the center of Section 7, Township 11 North, Range 3 West, Washington County, Idaho, and extending thence in a southerly direction through Sections 7, 18, 19 and 30, and into Section 31 of said Township and range; thence in a northerly and easterly direction through said Sections 31 and 30 and into and through Sections 25 and 26 in Township 11 North, Range 4 West; thence in a southerly and westerly direction through Sections 1, 2, 11, 10, 15, 16, 21, 28, 20, 29, 17, 19, and 18 in Township 10 North, Range

4 West, B. M., and thence in a southerly and westerly direction through Sections 13 and 24 to a point near what is known as Buttermilk Slough in the Northeast Quarter (NE¼) of Section 23, Township 10 North, Range 5 West, B. M.; and also that certain siphon and branch canal branching off or extending from the main canal, hereinbefore described, in the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section 36, Township 10 North, Range 4 West, B. M., and extending across Weiser River in a northeasterly direction through Sections 35, 26, 23, and 22, and in a southerly and westerly direction through Sections 27, 28 and 32, Township 11 North, Range 4 West, B. M.; and all branch canals, main and subordinate laterals, service ditches, pipe lines, headgates, and other structures of every kind and nature used, or intended to be used, in connection with said irrigation system, or any part thereof, being the identical irrigation system constructed by the Crane Creek Irrigation Land & Power Company under its contract with the defendants Sunnyside Irrigation District and Crane Creek Irrigation District, and in which system and irrigation works said Crane Creek Irrigation Land & Power Company has conveyed, subject to plaintiff's said lien, an undivided 22.4% interest to said Crane Creek Irrigation District, together with all of what is known as the Smelter Lateral and the Weiser River Siphon; and in which said system and irrigation works said Crane Creek Irrigation Land & Power Company has conveyed to the defendant Sunnyside

Irrigation District, subject to plaintiff's said lien, an undivided 47.2% interest, and all of what is known as the High Line Lateral Sunnyside Ditch, and also what is known as the Low Line Lateral as built both easterly and westerly from what is known as the Cove Creek Siphon.

(c) Also all water rights and rights to the use of water in connection with the reservoir and irrigation system, works and structures, hereinbefore described, acquired by said Defendants, Sunnyside Irrigation District and said Crane Creek Irrigation District, under their several contracts with the defeendant Crane Creek Irrigation Land & Power Company, and particularly the interest of said Districts in the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company, said permits being issued on the dates, and numbered and recorded in the office of the State Engineer of the State of Idaho, as follows, to-wit:

Permit No. 1720, recorded Book 6, page 1720, issued Dec. 9, 1905.

Permit No. 6830, recorded Book 20, page 6830, issued Aug. 16, 1910.

Permit No. 6832, recorded Book 20, page 6832, issued Sep. 3, 1910.

Permit No. 6833, recorded Book 20, page 6833, issued Sep. 30, 1910.

Permit No. 6834, recorded Book 20, page 6834, issued Oct. 20, 1910.

Permit No. 8507, recorded Book 27, page 8507, issued Aug. 10, 1912.

5. That the said plaintiff Portland Wood Pipe Company is entitled to and has a charge and lien for the security and payment of the above sums of money upon all the right, title and interest of the Crane Creek Irrigation Land and Power Company in and to the reservoir, canals, water rights, irrigation system, works and structures above described, which said lien or charge is subject only to the lien of the mortgage of Maney Brothers & Company, hereinafter referred to; and that the interest of said Crane Creek Irrigation Land and Power Company upon which plaintiff is adjudged and decreed a second lien or charge, subject as aforesaid to the mortgage of Maney Brothers & Company, is an undivided 30.4% in said canals, irrigation works, water rights, structures and reservoir, to a reservoir capacity of 70,617 acre feet, and all of the reservoir capacity in excess of 70,617 acre feet and all the right to the use of the water impounded in said reservoir for the development of power, being all the interest in said irrigation system, reservoirs, canals and water rights not conveyed by said Crane Creek Irrigation Land and Power Company to the said irrigation districts, and the interest so conveyed being as aforesaid an undivided 22.4% to said Crane Creek Irrigation District and an undivided 47.2% to said Sunnyside Irrigation District, with a reservation in said Crane Creek Irrigation Land and Power Company of all water stored in said reservoir in excess of 70,617 acre feet.

6. That the mechanic's lien to the said plaintiff Portland Wood Pipe Company is prior and superior

to any of the claims or liens of the defendants in this cause, except as to the interest of said Crane Creek Irrigation Land and Power Company in said irrigation system, reservoir and water rights, as to which interest the mechanic's lien of said Portland Wood Pipe Company is subject and subordinate to the mortgage of Maney Brothers and Company hereinafter referred to.

It is Further Ordered, Adjudged and Decreed, That the defendant Slick Brothers Construction Company, Limited, shall within thirty days after the entry of this decree pay, or cause to be paid, to said Portland Wood Pipe Company, or to the Clerk of this Court for the use and benefit of said plaintiff, the sums of money hereinbefore mentioned, together with interest thereon from the date of entry of this decree to the date of such payment at the rate of seven per cent. (7%) per annum, and that unless said payment be made by said defendant Slick Brothers Construction Company, Limited, or by any of the other defendants in this cause, or by any one in their behalf, within the time and in the manner herein described, all the property hereinbefore described may be sold as hereinafter directed to satisfy said claim of plaintiff; and that under and by said sale all equity of redemption, except as hereinafter provided, of the defendants, and each and every of them, and of any and all persons claiming by, through or under said defendants, or either of them, except the lien or claim of said Maney Brothers and Company in and to the said property, lands, rights and franchises,

be foreclosed and cut off and forever barred, and that said property be sold as an entirety and in one parcel without valuation, or appraisement, but subject to the prior lien of the mortgage of Maney Brothers and Company against the interest of said Crane Creek Irrigation Land and Power Company in said property, at public auction to the highest bidder or bidders at the Court House in Weiser, Washington County, State of Idaho, on a day or days to be fixed by the Special Master of this Court, and public notice of such sale and the time and place thereof, together with the manner and the terms upon which said sale is to be conducted, shall be given by such Special Master in the manner following, to-wit:

Said Special Master shall give notice of such sale by advertisement in a newspaper published at Weiser, Washington County, Idaho, once a week for at least four weeks next prior to such sale, and said notice shall, among other things, briefly describe in general terms the property and irrigation works to be sold, making reference to this decree for a full description thereof; and such Special Master shall have the power to adjourn said sale from time to time to a future date by oral announcement made at any time before the sale, or at the time noticed for such sale, by consent of the solicitors for plaintiff, or either of them, or the approval of the Judge of this Court, without prejudice to the notice or notices of sale and without necessity of publishing any further notice; but the Special Master may nevertheless give

such notice of his action by publication or by posting at the front door of said Court House, or otherwise, as he may deem fit.

That any party to this action may become a bidder or purchaser at said sale. That said sale shall be for cash, ten per cent. (10%) to be payable at the time of said sale, and the balance to be paid at the time of the confirmation by this Court of said sale.

That if the plaintiff Portland Wood Pipe Company shall bid in said property, then and in that event said bidder shall be entitled to have its judgment, or so much thereof as may be necessary, credited upon such bid instead of paying cash, paying, however, a sufficient sum in cash to satisfy and discharge all expenses of such sale.

That said Special Master shall make full report of his proceedings hereunder, and such supplemental reports from time to time as may be necessary and desirable to show fully his action in the premises; and upon said Special Master filing his report of sale, the purchaser or any party to this suit may move for confirmation thereof, and a time shall be set for the hearing of said motion and such objections as may be made to said confirmation; and if the sale be not confirmed a re-sale shall be ordered as authorized by law; and upon any such re-sale the same proceedings shall be had as upon the original sale, save and except that no further notice thereof need be given than a brief notice of the time and place of re-sale referring to the notices first published for the terms and conditions thereof, and for a de-

scription of the property, which notice shall be published for such duration as the Court in its order for re-sale may direct.

It is Further Ordered, Adjudged and Decreed, That upon payment of the purchase price by the purchaser or purchasers of said property, that said Special Master shall execute and deliver a deed conveying the property purchased to said purchaser or purchasers, or his or their successors or assigns, and upon the execution and delivery of such deed and the expiration of the period of redemption as hereinafter fixed, the grantee under said deed shall be let into the possession of the premises conveyed, and shall be entitled to hold and enjoy and possess said premises and property and all the rights, privileges, immunities and franchises thereto appertaining, free and clear of any lien or liens of any of the defendants herein, except the lien of the mortgage of Maney Brothers and Company as to the interest of said Crane Creek Irrigation Land and Power Company in said reservoir, water rights, canals and irrigation works.

It is Further Ordered, Adjudged and Decreed, That in case the proceeds of said sale shall prove to be insufficient to provide for the payment in full of the sums hereinbefore mentioned and described, then such Special Master shall find and report to this Court the amount of such deficiency or deficiencies, and, such report being confirmed by this Court, plaintiff shall be entitled to judgment therefor against the defendant Slick Brothers Construction

Company, Limited, and to have execution issued thereon pursuant to the rules and practice of this Court.

It is Further Ordered, Adjudged and Decreed, That W. C. Dunbar, Esq., of Boise, Idaho, be, and he is hereby, appointed Special Master to execute this decree and make the said sale, and to execute and deliver the deeds of conveyance of the property sold to the purchaser or purchasers thereof. As soon as any sale shall have been made by the said Special Master, in pursuance of this decree, he shall report the same to this Court for confirmation, and shall from time to time thereafter make such further supplemental reports as shall be necessary to keep the Court and the parties to this suit properly advised of his proceedings in the execution of this decree.

It is Further Ordered, Adjudged and Decreed, That the defendant Crane Creek Irrigation Land and Power Company, hereinafter sometimes called the Crane Creek Company, duly made, executed and delivered to said Maney Brothers and Company the note and mortgage described in said cross-complainant's cross-bill, and that such note was duly endorsed by the defendants, E. D. Ford, A. G. Butterfield and R. C. McKinney, and that said E. D. Ford, A. G. Butterfield and R. C. McKinney are liable for the payment of the full amount due said cross-complainant.

And It is Further Ordered, Adjudged and Decreed, Relative to the claim of said Maney Brothers and Company, as follows, to-wit:

1. That said Maney Brothers and Company do have and recover from the defendant Crane Creek Irrigation Land and Power Company, E. D. Ford, A. G. Butterfield and R. C. McKinney, and each of them, the sum of $35,986.10, with interest thereon at the rate of six per cent. (6%) per annum from the 27th day of December, 1913, and the sum of $1,-000.00 as attorney's fee for the foreclosure of said mortgage, making in the aggregate the sum of $40,-140.00, and costs and disbursements herein, taxed at $65.60.

2. That the payment of the aforesaid sums is secured by the said mortgage from said Crane Creek Company to said cross-complainant, described in the cross-complaint and bearing date the 29th day of September, 1911, which said mortgage is a first charge and lien upon all the right, title and interest of the defendant Crane Creek Irrigation Land and Power Company in the lands and premises, reservoir, canals, irrigation works, structures and water rights hereinbefore described; and that the interest of said Crane Creek Irrigation Land and Power Company, subject to the conditions hereinafter contained, in said irrigation system is an undivided 30.4% in said canals, irrigation works, water rights, structures and reservoir (excepting those certain canals and laterals hereinbefore adjudged as having been entirely conveyed to the Crane Creek Irrigation District or the Sunnyside Irrigation District), until the capacity of the reservoir amounts to 70,617 acre feet; and said Crane Creek Company is the owner,

subject to said mortgage, of all reservoir capacity in said reservoir in excess of 70,617 acre feet, and of all right to the use of the water impounded in said reservoir for the development of power.

3. That the mortgage of said cross-complainant is prior and superior to any of the claims or liens of the said defendants in this cause as against the right, title and interest, and the whole thereof, of said Crane Creek Company in and to the said reservoir, canals, water rights, irrigation system, works and structures; but the interest in said irrigation works, reservoir, water rights, canals and structures conveyed by said Crane Creek Company to the Sunnyside Irrigation District, to-wit: An undivided 47.2%, and the interest conveyed by said Crane Creek Company in said property, irrigation works, water rights, reservoir, canals and structures to the Crane Creek Irrigation District, to-wit: An undivided 22.4% interest, are free and clear of the lien of said mortgage, and said cross-complainant Maney Brothers and Company has no lien, claim or demand whatsoever on or against the interests of said Crane Creek Irrigation District and of said Sunnyside Irrigation District in and to the said reservoir, irrigation works, water rights, canals and structures.

4. That the said mortgage of the cross-complainant Maney Brothers and Company, is also a first charge and lien for the security of the payment of the sums of money so due cross-complainant, as aforesaid, as against any right, title and interest of the defendants herein in and to the following described lands and premises:

SE¼ of Sec. 5
E½ of the SE¼, and the SW¼ of the SE¼ of Sec. 10
NE¼ of the NE¼ of Sec. 15
E½ of the NE¼ of Sec. 10
N½ of the SE¼ of Sec. 17
E½ of the NW¼ of Sec. 17
SE¼ of the SW¼ of Sec. 8
SE¼ of the NW¼, and the E½ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 14
NW¼ of the NE¼, and the N½ of the NW¼, and the SW¼ of the NW¼ of Sec. 12
Lot No. 4, and the SE¼ of the SW¼ of Sec. 7
All in Township Ten (10) North, Range Four (4) West, B. M.

SW¼ of Sec. 27
N½ of the NE¼, and the SE¼ of the NE¼, and the NE¼ of the SE¼ of Sec. 13
All in Township Eleven (11) North, Range Four (4) West, B. M.

E½ of the SE¼ of Sec. 12, Township Ten (10) North, Range Five (5) West, B. M.
NE¼ of the SW¼ of Sec. 9
NW¼ of the SW¼ of Sec. 9
SW½ of the SW¼ of Sec. 9
SE¼ of the NW¼ of Sec. 7
NE¼ of the SE¼ of Sec. 8
NW¼ of the SE¼ of Sec. 8
NW¼ of the SE¼ of Sec. 9

SW¼ of the NE¼ of Sec. 10
NE¼ of the NW¼ of Sec. 10
All in Township Ten (10) North, Range Four (4) West, B. M.

NW¼ of the NE¼ of Sec. 33
SW¼ of the NE¼ of Sec. 33
NE¼ of the NW¼ of Sec. 33
NW¼ of the NW¼ of Sec. 33
SW¼ of the NW¼ of Sec. 33
SE¼ of the NW¼ of Sec. 33
NE¼ of the SW¼ of Sec. 33
NW¼ of the SW¼ of Sec. 33
All in Township Eleven (11) North, Range Four (4) West, B. M.

SE¼ of the SW¼ of Sec. 2, Township Ten (10) North, Range Five (5) West, B. M.

NE¼ of the NE¼ of Sec. 10
SW¼ of the NE¼ of Sec. 10
SE¼ of the NE¼ of Sec. 10
NE¼ of the SE¼ of Sec. 10
NW¼ of the SE¼ of Sec. 10
SW¼ of the SE¼ of Sec. 10
SE¼ of the SE¼ of Sec. 10
NW¼ of the SW¼ of Sec. 11
NE¼ of the NW¼ of Sec. 13
NW¼ of the NW¼ of Sec. 13
NE¼ of the NE¼ of Sec. 14
NE¼ of the NE¼ of Sec. 15
NW¼ of the NE¼ of Sec. 15
SW¼ of the NE¼ of Sec. 15

All in Township Eleven (11) North, Range Six (6) West, B. M.

SW¼ of the SW¼ of Sec. 36
SW¼ of the SE¼ of Sec. 36
SE¼ of the SE¼ of Sec. 36
NE¼ of the SE¼ of Sec. 36
NW¼ of the SE¼ of Sec. 36
All in Township Eleven (11) North, Range Five (5) West, B. M.

5. That the defendants Crane Creek Irrigation Land and Power Company, E. D. Ford, A. G. Butterfield and R. C. McKinney shall within thirty days after the entry of this decree pay, or cause to be paid, to said cross-complainant Maney Brothers and Company, or to the Clerk of this Court for the use and benefit of said cross-complainant, the sums of money hereinbefore mentioned, to-wit: The sum of $40,140.00, together with costs and disbursements herein, and interest thereon from date of entry of this decree to the date of such payment at the rate of seven per cent. (7%) per annum; and if such payment be not made by said defendants, or by any one of them, within the time and in the manner herein described, all the property hereinbefore described and upon which the mortgage of said cross-complainant has herein been adjudged and decreed a lien may be sold as herein directed to satisfy said claim of the said cross-complainant; and that under and by said sale, all equity of redemption, except as hereinafter provided, of said defendants and

each and every of them, and of any and all persons claiming by, through or under said defendants, or either of them, in the said lands and premises, reservoir, canals, irrigation system, works, structures and water rights, be foreclosed, cut off and forever barred, and that said property be sold as an entirety and in one parcel, without valuation or appraisement, at public auction to the highest bidder or bidders, at the Court House in Weiser, Washington County, State of Idaho, on a day or days to be fixed by the said Special Master of this Court, and public notice of such sale and the time and place thereof, together with the manner and the terms upon which said sale is to be conducted, shall be given by such Special Master in the manner hereinbefore directed relative to the sale under the claim and lien of the plaintiff Portland Wood Pipe Company, and the direction and provisions of this decree relative to such sale and the confirmation thereof and the execution of deeds and other necessary conveyances to the purchaser shall be observed, so far as applicable, in the sale that may be had to satisfy the claim of said Maney Brothers and Company. That any party to this action may become a bidder or purchaser at such sale; and if the cross-complainant Maney Brothers and Company, or any one for them or in their behalf, shall bid in said property, then and in that event such bidder shall be entitled to have the judgment in favor of said Maney Brothers and Company, or so much thereof as may be necessary, credited upon such bid instead of paying cash, paying, however,

a sufficient sum in cash to satisfy and discharge all expenses of such sale.

6. That upon the payment of the purchase price by the purchaser or purchasers of the said property, lands, premises, reservoir, water rights, canals, works, structures and irrigation system such Special Master shall execute and deliver a deed conveying the property purchased to such purchaser or purchasers, or his or their successors or assigns; and upon the execution and delivery of such deed and the expiration of the period of redemption as hereinafter fixed, the grantee thereunder shall be let into possession of the premises and property conveyed, and shall be entitled to hold, enjoy and possess said premises and property, and all the rights and privileges, immunities and franchises thereto appertaining, free and clear of any lien or liens of any of the defendants herein.

7. That in case the proceeds of said sale shall prove to be insufficient to provide for the payment in full of the sums hereinbefore mentioned and described, then such Special Master shall find and report to this Court the amount of such deficiency or deficiencies, and, such report being confirmed by this Court, the cross-complainant Maney Brothers and Company shall be entitled to judgment therefor against the defendants Crane Creek Irrigation Land and Power Company, E. D. Ford, A. G. Butterfield and R. C. McKinney, and to have execution issued thereon pursuant to the rules and practice of this Court.

8. That the provisions of the contracts, dated

August 22, 1910, between Crane Creek Irrigation Land and Power Company and the said Crane Creek Irrigation District and Sunnyside Irrigation District, to the effect that in the event said Crane Creek Irrigation Land and Power Company shall not increase the storage capacity of said reservoir to 70,617 acre feet within five years from the delivery and acceptance of the proportion of said irrigation system which said contracts provide shall be delivered and conveyed to said Districts, respectively, and that, in such event, said Company shall convey to said Districts certain additional percentage of interest, insofar as the same are still in force and effect and have not been modified or changed by supplemental contracts or agreements between said parties, shall be binding upon the purchaser or purchasers, their grantees, successors or assigns, under any sale or sales had in satisfaction of the lien or claim of said Maney Brothers and Company; and the purchaser or purchasers under such sale shall take only such interest in said reservoir, canals, water rights and irrigation system as said Crane Creek Irrigation Land and Power Company may have or be entitled to hold and retain under existing contracts between said Crane Creek Company and said Districts, entered into prior to the filing of the cross-bill of said Maney Brothers and Company.

It is Further Ordered, Adjudged and Decreed, That the enforcement by the plaintiff Portland Wood Pipe Company of the terms of this decree relating to its claim shall be without prejudice to the right

of the cross-complainant Maney Brothers and Company hereunder; and likewise the enforcement of the terms and provisions of this decree relative to the rights and claim of said Maney Brothers and Company shall be without prejudice to the rights of said Portland Wood Pipe Company; and said parties may separately and severally proceed hereunder for the enforcement of their respective rights and claims.

It is Further Ordered, Adjudged and Decreed, That all property, lands, premises, water rights, irrigation works, canals and structures and interests therein that may be sold under the provisions of this decree, whether in satisfaction of the claim of the Portland Wood Pipe Company or the claim of said Maney Brothers and Company, shall be subject to redemption by qualified redemptioners under the laws of the State of Idaho within three months from the date of confirmation of such sale, which redemption period is so fixed at three months upon the express agreement of the parties hereto, interested in said decree, that the same is a reasonable and proper period for redemption, in view of the nature and character of the property to be sold and the circumstances of the parties; that such redemption shall be made by payment of the amount required for redemption, computed according to the practice of this Court. Further provisions relative to such redemption may be made in the order of confirmation of sale.

It is Further Ordered, Adjudged and Decreed, That Slick Brothers Construction Company, Limit-

ed, one of the cross-complainants herein, take nothing by its cross-bill, and said cross-bill is hereby dismissed; and the defendants to said cross-bill shall be entitled to judgment against said Slick Brothers Construction Company, Limited, for their costs incurred in connection therewith, to be taxed as provided by statute and the rules of Court.

Any party may apply for further directions at the foot of this decree.

Dated June 12, 1915.

(Signed) FRANK S. DIETRICH,
District Judge.

Filed June 12, 1915.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

And now comes the cross-complainant, Maney Brothers & Co., and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above entitled cause on the 12th day of June, A. D. 1915, says that said decree made and entered as aforesaid and the decision made and filed by the Court in this cause on the 17th day of May, 1915, are erroneous and unjust to this cross-complainant, and particularly in this:

1. Because the said Court erred in holding, decreeing and deciding that the mortgage of said cross-complainant referred to in said decree and in said decision, was not a first and prior lien upon the interest in the irrigation works, reservoir, water

rights, canals and structures conveyed by said Crane Creek Irrigation Land and Power Company to the defendant Sunnyside Irrigation District, or any part thereof.

2. Because the said Court erred in holding, decreeing and deciding that the cross-defendant Sunnyside Irrigation District took title free and clear of the lien of the mortgage of said cross-complainant to an undivided 47.2% interest, or any other interest, in the irrigation works, reservoir, water rights, canals and structures described in cross-complainant's mortgage or therein referred to, and conveyed to said Sunnyside Irrigation District by said Crane Creek Irrigation, Land & Power Company after the execution and recording of said mortgage.

3. Because the said Court erred in holding, decreeing and deciding that cross-defendant Crane Creek Irrigation Land and Power Company conveyed to the cross-defendant Crane Creek Irrigation District free of the lien of cross-complainant's mortgage any interest whatsoever in the reservoir, canals, water rights, irrigation system, works and structures described or referred to in cross-complainant's mortgage.

4. Because the said Court erred in holding, decreeing and deciding that the cross-defendant Crane Creek Irrigation District acquired an undivided 22.4% interest, or any other interest, in the irrigation works, reservoir, water rights, canals and structures described or referred to in complainant's mortgage free and clear of the lien of said mortgage.

5. Because the said Court erred in holding, decreeing and deciding that said cross-complainant had no lien, claim, or demand whatsoever on or against the interests of said Crane Creek Irrigation District and of said Sunnyside Irrigation District, cross-defendants, in and to the reservoir, irrigation works, water rights, canals and structures described in the decree and purporting to have been conveyed or transferred to said cross-defendants by the said Crane Creek Irrigation Land and Power Company subsequent to the execution and recording of cross-complainant's mortgage.

6. Because the said Court erred in holding, decreeing and deciding that the cross-complainant's mortgage was not a lien upon all the property, irrigation works, reservoir, canals, water rights and structures owned by the Crane Creek Irrigation Land and Power Company at the time of the execution of said mortgage or thereafter acquired by said Company, and particularly upon all of that certain irrigation system, reservoir, canals, water rights, works and structures described in the decree herein and in cross-complainant's said mortgage.

7. Because the said Court erred in holding, decreeing and deciding that the sum of One Thousand Dollars ($1,000.00) was a reasonable attorneys' fee to be allowed cross-complainant for the foreclosure of its said mortgage, and in not holding and deciding that the said cross-complainant was entitled to an attorneys' fee of Three Thousand Dollars ($3,000.-00) for the foreclosure of its said mortgage.

8. Besause said Court erred in holding and deciding that certain resolutions passed by the Board of Directors of the said Sunnyside Irrigation District and by the Board of Directors of said Crane Creek Irrigation District on or about the 18th day of August, 1914, and a certain certificate executed by the President of each of said Districts in June, 1914 (cross-complainant's, Maney Brothers & Co., Exhibits "5" and "6"), conceding the prior lien of cross-complainant's said mortgage upon the irrigation works, water rights and structures conveyed to said Districts by said Crane Creek Irrigation Land and Power Company, were ineffectual or without force and effect, and in holding and deciding that said resolutions and certificate had no efficacy whatsoever.

9. Because the said Court erred in holding and deciding that the conveyances from said Crane Creek Irrigation Land and Power Company to said Irrigation Districts made, executed and delivered long after the execution and recording of cross-complainant's said mortgage and long after full notice of said mortgage had been acquired and obtained by said Districts, related back to the date of the contract of August 22nd, 1910, between said Crane Creek Irrigation Land and Power Company and the said Irrigation Districts for the sale and construction of said irrigation works.

10. Because the Court erred in holding and deciding that said Irrigation Districts had the right to apply the bonds given as a part of the purchase price of said irrigation works to the payment of other liens

and encumberances, and that the bonds were so applied by the Districts, and that none of the bonds constituting the purchase price were turned over to or retained by the Crane Creek Irrigation Land and Power Company for its own profit, and that after applying such bonds to the payment of mechanics' liens no balance remained that could be applied to the reduction of cross-complainant's mortgage.

11. Because the Court erred in holding and deciding that the lien of cross-complainant's mortgage did not extend to such property, rights and interests as were covered by the contracts between the Crane Creek Irrigation, Land and Power Company and said Irrigation Districts and subsequently embraced in deeds from said Company to said Districts, made, executed and delivered long after the execution and recording of cross-complainant's mortgage.

12. Because the said Court erred in not decreeing that cross-complainant's said mortgage was a lien upon all of said irrigation system, reservoir, water rights, works and structures, and in not decreeing a sale of the whole thereof in satisfaction of the amount due cross-complainant under said mortgage.

Wherefore, cross-complainant prays that said decree be reversed and modified to the extent of giving to the said cross-complainant a first and prior lien upon all of said irrigation system, water rights, reservoir, works and structures, and allowing said cross-complainant's attorneys fees for Three Thousand Dollars ($3,000.00) for the foreclosure of its said mortgage; and with such directions to said District Court as may be necessary or proper for the

protection of cross-complainant's rights under its said mortgage.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Cross-Complainant,
Maney Brothers & Co.

Filed August 14th, 1915.

(Title of Court and Cause.)

PETITION FOR APPEAL.

And now comes Maney Brothers & Co. (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), one the cross-complainants above named, and conceiving itself aggrieved by the decree made and entered on the 12th day of June, 1915, in the above cause, and by the decision of the Court rendered herein on the 17th day of May, 1915, doth hereby appeal from said decree and decision to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and said cross-complainant prays that this, its appeal, may be allowed, and that citation issue as provided by law, and that a transcript of the record, evidence, proceedings and papers upon which said decree and decision was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Cross-Complainant,
Maney Brothers & Co.
Offices: Idaho Building, Boise, Idaho.

ORDER ALLOWING APPEAL.

And now, to-wit, on this 14th day of August, 1915, it is ordered that the foregoing petition be granted, and that the appeal be allowed as prayed for, and that cross-complainant, Maney Brothers & Co., file a bond on appeal in the sum of Five Hundred Dollars ($500.00) with good and sufficient security, to be approved by the Court.

(Signed) FRANK S. DIETRICH,
District Judge.

Filed August 14th, 1915.

(Title of Court and Cause.)

BOND ON APPEAL.

Know All Men by These Presents, That we, Maney Brothers & Co. (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells) as principal in this obligation, and the Boise Title and Trust Company, a corporation with its principal place of business at Boise, Idaho, as surety, are held and firmly bound unto the above-named cross-defendants in the sum of Five Hundred Dollars ($500.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of August, 1915.

The condition of this obligation is such, that:

Whereas, The above-named Maney Brothers & Co., cross-complainant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order and decree made and entered in the above entitled suit in the District Court of the United States for the District of Idaho, Southern Division, on the 12th day of June, A. D. 1915.

Now, Therefore, If the above-named cross-complainant and appellant, Maney Brothers & Co., shall prosecute its said appeal to effect and answer all costs if it shall fail to make its said plea good, then the above obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

In Witness Whereof, The said principal has caused its name to be hereunto subscribed by a member of its firm, and the said Boise Title and Trust Company, as surety, has caused its name to be hereunto subscribed by its duly authorized officers, and its corporate seal affixed.

MANEY BROTHERS & CO.,
By E. J. Wells.

BOISE TITLE AND TRUST COMPANY,
(Seal) By S. H. Hays, President.
Attest: W. J. Abbs, Secretary.

Approved August 14th, 1915.

FRANK S. DIETRICH,
District Judge.

Filed August 14th, 1915.

(Title of Court and Cause.)

Assignment of Errors by Crane Creek Irrigation District.

Comes now the cross-defendant, Crane Creek Irrigation District, and makes and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 12th day of June, A. D. 1915, in said cause:

I.

The U. S. District Court for the District of Idaho, Southern Division, erred in adjudging by its said final decree herein, that the mortgage of cross-complainant, Maney Brothers & Co., was a charge and lien upon the lands and premises, reservoir, canals, irrigation works, structures and water rights comprising the irrigation system constructed by the Crane Creek Irrigation Land & Power Company, defendant herein, under a contract with this cross-defendant, and cross-defendant Sunnyside Irrigation District, and which had been theretofore, and was at the time the said alleged mortgage was given, dedicated to public uses.

II.

The said Court erred in adjudging that the mortgage executed by the Crane Creek Irrigation Land & Power Company, a corporation, to the cross-complainant, Maney Brothers & Co., a co-partnership, on the 29th day of September, A. D. 1911, was a first charge and lien upon all the right, title and interest of the said defendant, Crane Creek Irriga-

tion Land & Power Company, in the lands and premises, reservoir, canals, irrigation works, structures and water rights of the irrigation system constructed as hereinbefore stated, by the said Crane Creek Irrigation Land & Power Company, for this cross-defendant Crane Creek Irrigation District, and cross-defendant, Sunnyside Irrigation District, and dedicated to public uses.

III.

The said Court erred in adjudging that the said mortgage was a valid charge and first lien upon an undivided 30.4% of the said hereinabove mentioned irrigation system, superior to the right, title and interests of this cross-defendant, and of cross-defendant, Sunnyside Irrigation District.

IV.

The said Court erred in not adjudging and decreeing that the said mortgage executed by the Crane Creek Irrigation Land & Power Company on the 29th day of September, A. D. 1911, and delivered to the said cross-complainant, Maney Brothers & Co., a co-partnership, as security for the indebtedness accrued and to accrue to the said co-partneership from the said Crane Creek Irrigation Land & Power Company, through and because of the construction of said irrigation system, was invalid, in that the said Crane Creek Land & Power Company had no authority or power vested in it to execute a mortgage upon said property, or any part thereof, and because in all the premises the said cross-complainant, Maney Brothers & Co., had actual knowledge and notice that the

property hereinbefore and in said decree mentioned, had been and was dedicated to public uses, and there was no authority vested in the Crane Creek Irrigation Land & Power Company to charge the same with a valid mortgage lien.

V.

The said court erred in adjudging that the alleged interest of the Crane Creek Irrigation Land & Power Company in the irrigation system of this cross-defendant, and of the cross-defendant, Sunnyside Irrigation District, should be sold at public sale; and the said court erred in adjudging that any part of the said system should be sold at public sale to satisfy the claim of the cross-complainant, Maney Brothers & Co., because under the law and the statutes of Idaho, the said property, and the whole thereof, was and is exempt from execution or foreclosure sale and the said court had no authority in the premises.

Wherefore, this cross-defendant prays that the judgment of the said District Court of the United States for the District of Idaho, Southern Division, be reversed, and that the said court be directed to enter its decree denying a foreclosure of the said mortgage against any of the public property hereinbefore mentioned and described, with such other and further relief to which this cross-defendant may be entitled.

ED R. COULTER,
C. S. VARIAN,
Solicitors for Cross-Defendant Crane Creek Irrigation District.

Due and legal service by copy of the within Assignment of Errors is hereby admitted this 23rd day of August, 1915.

RICHARDS & HAGA,
Solicitors for Cross-Complainant Maney Brothers and Company.

Endorsed: Filed Aug. 23, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Assignment of Errors by Sunnyside Irrigation District.

Comes now the cross-defendant, Sunnyside Irrigation District, and makes and files the following Assignment of Errors upon which it will rely upon its prosecution of the Appeal in the above entitled cause from the decree made by this Honorable Court on the 12th day of June, A. D. 1915, in said cause:

I.

The United States District Court for the District of Idaho, Southern Division, erred in adjudging by its said final decree herein, that the mortgage of cross-complainant, Maney Brothers & Co., was a charge and lien upon the lands and premises, reservoir, canals, irrigation works, structures and water rights comprising the irrigation system constructed by the Crane Creek Irrigation Land & Power Company, defendant herein, under a contract with this cross-defendant, and cross-defendant Crane Creek Irrigation District, and which had been theretofore,

and was at the time the said alleged mortgage was given, dedicated to public uses.

II.

The said Court erred in adjudging that the mortgage executed by the Crane Creek Irrigation Land & Power Company, a corporation, to the cross-complainant, Maney Brothers & Co., a co-partnership, on the 29th day of September, A. D. 1911, was a first charge and lien upon all the right, title and interest of the said defendant, Crane Creek Irrigation Land & Power Company, in the lands and premises, reservoir, canals, irrigation works, structures and water rights of the irrigation system constructed as hereinbefore stated, by the said Crane Creek Irrigation Land & Power Company, for this cross-defendant, Sunnyside Irrigation District, and cross-defendant, Crane Creek Irrigation District, and dedicated to public uses.

III.

The said Court erred in adjudging that the said mortgage was a valid charge and first lien upon an undivided 30.4% of the said hereinabove mentioned irrigation system, superior to the right, title and interest of this cross-defendant, and of cross-defendant Crane Creek Irrigation District.

IV.

The said Court erred in not adjudging and decreeing that the said mortgage executed by the Crane Creek Irrigation Land & Power Company on the 29th day of September, A. D. 1911, and delivered to

the said cross-complainant, Maney Brothers & Co., a co-partnership, as security for the indebtedness accrued and to accrue to the said co-partnership from the said Crane Creek Irrigation Land & Power Company, through and because of the construction of said irrigation system was invalid, in that the said Crane Creek Land & Power Company had no authority or power vested in it to execute a mortgage upon said property, or any part thereof, and because in all the premises the said cross-complainant, Maney Brothers & Co., had actual knowledge and notice that the property hereinbefore and in said decree mentioned, had been and was dedicated to public uses, and there was no authority vested in the Crane Creek Irrigation Land & Power Company to charge the same with a valid mortgage lien.

V.

The said Court erred in adjudging that the alleged interest of the Crane Creek Irrigation Land & Power Company in the irrigation system of this cross-defendant, and of the cross-defendant, Crane Creek Irrigation District, should be sold at public sale; and the said Court erred in adjudging that any part of the said system should be sold at public sale to satisfy the claim of the cross-complainant, Maney Brothers & Co., because under the law and the statutes of Idaho, the said property, and the whole thereof, was and is exempt from execution or foreclosure sale and the said Court had no authority in the premises.

Wherefore, This cross-defendant prays that the judgment of the said District Court of the United States for the District of Idaho, Southern Division, be reversed, and that the said Court be directed to enter its decree denying a foreclosure of the said mortgage against any of the public property hereinbefore mentioned and described, with such other and further relief to which this cross-defendant may be entitled.

ED R. COULTER,
C. S. VARIAN,
Solicitors for Cross-Defendant Sunnyside Irrigation District.

Due and legal service by copy of the within Assignment of Errors is hereby admitted this 23rd day of August, 1915.

RICHARDS & HAGA,
Solicitors for Cross-Complainant Maney Brothers & Company.

Endorsed: Filed Aug. 23, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Order Allowing Appeal by Sunnyside Irrigation District Approving Record and Bond for Costs.

On reading and filing the Notice of Appeal of Sunnyside Irrigation District, a corporation, cross-defendant herein, and the assignment of errors herein having been made and filed by the said cross-defendant, it is ordered that an Appeal to the United States

Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore made, entered and filed herein on the 12th day of June, A. D. 1915, be, and the same is, hereby allowed, and that the transcript of the record herein be forthwith transmitted to the said Circuit Court of Appeals; and it appearing that an Appeal by Maney Brothers & Co., cross-complainants herein, to the said Circuit Court of Appeals for the Ninth Circuit, has been heretofore allowed and perfected, and that the same is and will be sufficient for all the purposes of the present Appeal by the Sunnyside Irrigation District, it is further ordered, that the record upon the said last mentioned Appeal shall be the same as that prepared by and for the Appeal by Maney Brothers & Co., as aforesaid, and that the amount of security on the said Appeal by the Sunnyside Irrigation District is hereby fixed at the sum of Two Hundred Dollars, and that upon making and filing with the clerk of this Court a good and sufficient bond in said sum by the said Sunnyside Irrigation District, the same shall act for costs and all further proceedings, etc., shall be stayed until the final determination of said Appeal by the United States Circuit Court of Appeals, and until the further order of this Court.

Done in open Court this 23rd day of August, A. D. 1915.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 23, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Order Allowing Appeal by Crane Creek Irrigation District, Approving Record and Bond for Costs.

On reading and filing the Notice of Appeal of Crane Creek Irrigation District, a corporation, cross-defendant herein, and the assignment of errors herein having been made and filed by the said cross-defendant, it is ordered that an Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore made, entered and filed herein on the 12th day of June, A. D. 1915, be, and the same is, hereby allowed, and that the transcript of the record herein be forthwith transmitted to the said Circuit Court of Appeals; and it appearing that an appeal by Maney Brothers & Co., cross-complainants herein, to the said Circuit Court of Appeals for the Ninth Circuit, has been heretofore allowed and perfected, and that the same is and will be sufficient for all the purposes of the present appeal by the Crane Creek Irrigation District, it is further ordered, that the record upon the said last mentioned appeal shall be the same as that prepared by and for the appeal by Maney Brothers & Co., as aforesaid, and that the amount of security on the said appeal by the Crane Creek Irrigation District is hereby fixed at the sum of Two Hundred Dollars, and that upon making and filing with the clerk of this Court a good and sufficient bond in said sum by the said Crane Creek Irrigation District, the same shall act for costs and all further proceedings, etc., shall be stayed until the final determination of said appeal by the United

States Circuit Court of Appeals, and until the further order of this Court.

Done in open Court this 23rd day of August, A. D. 1915.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 23, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Notice of Appeal by Crane Creek Irrigation District.

The above-named cross-defendant, the Crane Creek Irrigation District, a corporation, conceiving itself aggrieved by the final decree made and entered in the above entitled cause on the 12th day of June, A. D. 1915, wherein and whereby it was ordered, adjudged and decreed that that certain mortgage executed by the Crane Creek Irrigation Land & Power Company, a corporation, to the said Maney Brothers & Company, a co-partnership, on the 29th day of September, A. D. 1911, was a first charge and lien upon all the right, title and interest of the said defendant, Crane Creek Irrigation Land & Power Company, in the lands and premises, reservoir, canals, irrigation works, structures, water rights, comprising and being a part of the irrigation system of this cross-defendant, and cross-defendant, Sunnyside Irrigation District, a corporation; and that the interest of the said Crane Creek Irrigation Land & Power Company being an undivided 30.4% in the said above mentioned property was charged by the said mort-

gage as a first lien and superior to the right, title and interest of this cross-defendant, and cross-defendant, Sunnyside Irrigation District; all as security for the payment to the said cross-complainant, Maney Brothers & Company, of the sums of money adjudged to be due it from the said cross-defendant, the Crane Creek Irrigation Land & Power Company, does hereby appeal from the said final decree of June 12, 1915, to the United States Circuit Court of Appeals, for the Ninth Circuit, and so much thereof as charges any part of the irrigation system of this cross-defendant, and cross-defendant, Sunnyside Irrigation District, with the lien of the said mortgage, and adjudges a sale of said irrigation system for the reasons set forth in the assignment of errors, which is filed herewith by the said cross-defendant, the Crane Creek Irrigation District; and the said cross-defendant, Crane Creek Irrigation District, prays that the amount of security on said appeal to be furnished by it for costs and as a supersedeas, be fixed by the court and that upon the filing with the clerk of this court of such bond all further proceedings shall be stayed until the final determination of said appeal by the United States Circuit Court of Appeals.

And, inasmuch as the said cross-complainant, Maney Brothers & Company, has taken and perfected an appeal from the said decree to the said Circuit Court of Appeals for the Ninth Circuit, and the record on said appeal has been prepared and approved and is sufficient for the purposes of the appeal by

this cross-defendant, as it is advised, it is further prayed that an order be entered adjudging such record when printed to be sufficient for all the purposes of this cross-appeal.

ED R. COULTER,
C. S. VARIAN,
Solicitors for Crane Creek Irrigation District, Cross-Defendant.

Due and legal service by copy of the within Notice of Appeal is hereby admitted this 23rd day of August, 1915.

RICHARDS & HAGA,
Solicitors for Cross-Complainant, Maney Brothers & Company.

Endorsed: Filed Aug. 23, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Notice of Appeal by Sunnyside Irrigation District.

The above-named cross-defendant, the Sunnyside Irrigation District, a corporation, conceiving itself aggrieved by the final decree made and entered in the above entitled cause on the 12th day of June, A. D. 1915, wherein and whereby it was ordered, adjudged and decreed that that certain mortgage executed by the Crane Creek Irrigation Land & Power Company, a corporation, to the said Maney Brothers & Company, a co-partnership, on the 29th day of September, A. D. 1911, was a first charge and lien upon all the right, title and interest of the said defendant, Crane Creek Irrigation Land & Power Com-

pany, in the lands and premises, reservoir, canals, irrigation works, structures, water rights, comprising and being a part of the irrigation system of this cross-defendant, and cross-defendant, Crane Creek Irrigation District, a corporation; and that the interest of the said Crane Creek Irrigation Land & Power Company being an undivided 30.4% in the said above mentioned property was charged by the said mortgage as a first lien and superior to the right, title and interest of this cross-defendant, and cross-defendant Crane Creek Irrigation District; all as security for the payment to the said cross-complainant, Maney Brothers & Company, of the sums of money adjudged to be due it from the said cross-defendant, the Crane Creek Irrigation Land & Power Company, does hereby appeal from the said final decree of June 12, 1915, to the United States Circuit Court of Appeals, for the Ninth Circuit, and so much thereof as charges any part of the irrigation system of this cross-defendant, and cross-defendant Crane Creek Irrigation District, with the lien of the said mortgage, and adjudges a sale of said irrigation system for the reasons set forth in the assignment of errors, which is filed herewith by the said cross-defendant, the Sunnyside Irrigation District; and the said cross-defendant, Sunnyside Irrigation District, prays that the amount of security on said Appeal to be furnished by it for costs, damages and as a supersedeas, be fixed by the court and that upon the filing with the clerk of this court of such bond all further proceedings shall be stayed until the final determination of

said Appeal by the United States Circuit Court of Appeals.

And, inasmuch as the said cross-complainant, Maney Brothers & Company, has taken and perfected an appeal from the said decree to the said Circuit Court of Appeals, for the Ninth Circuit, and the record on said Appeal has been prepared and approved and is sufficient for the purposes of the Appeal by this cross-defendant, as it is advised, it is further prayed that an order be entered adjudging such record when printed to be sufficient for all the purposes of this cross-appeal.

ED R. COULTER,
C. S. VARIAN,
Solicitors for Sunnyside Irrigation District, Cross-Defendant.

Due and legal service by copy of the within Notice of Appeal is hereby admitted this 23rd day of August, 1915.

RICHARDS & HAGA,
Solicitors for Cross-Complainants, Maney Brothers & Company.

Endorsed: Filed Aug. 23, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Undertaking on Appeal.

Know All Men By These Presents, That we, Crane Creek Irrigation District, a corporation, as principal, and the American Surety Company of New York, a corporation, as surety, are held and firmly

bound unto J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells, as co-partners, and impleaded in the above entitled cause as Maney Brothers & Co., in the sum of Two Hundred Dollars, lawful money of the United States of America, to be paid to the several co-partners above named, their and each of their administrators, heirs and assigns, to which payment well and truly to be made we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of August, A. D. 1915.

Whereas, The above-named defendant, Crane Creek Irrigation District, a corporation, obtained in open court an order allowing its appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from a decree in favor of the above-named co-partners, under the name of Maney Brothers & Co., against the property of this cross-defendant, and of the cross-defendant, Sunnyside Irrigation District, rendered in said District Court on the 12th day of June, A. D. 1915, to reverse the said decree, and

Whereas, the said United States District Court has fixed the sum of a bond on said appeal as security for all costs and damages, in the sum of Two Hundred Dollars,

Now, Therefore, The condition of this obligation is such that if the Crane Creek Irrigation District shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it, including all just damages for delay and costs and

interest on said appeal, if it fails to make its said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and effect.

In Witness Whereof, The parties aforesaid have caused their corporate names to be hereunto subscribed, and their corporate seals attached by the proper officers in that behalf duly authorized.

(Seal) CRANE CREEK IRRIGATION DISTRICT,

By Wm. Theurer, President.

(Seal) AMERICAN SURETY COMPANY OF NEW YORK,

By G. B. Eckles, Resident Vice President.

Wm. R. Werb, Resident Assistant Secretary.

B. S. Varian, Resident Agent.

The foregoing bond is hereby approved as to form amount and sufficiency of surety this 27th day of August, A. D. 1915. FRANK S. DIETRICH,

District Judge.

(Title of Court and Cause.)

Statutory Affidavit for Corporate Surety. Idaho.

State of Utah,

County of Salt Lake,—ss.

On the 21st day of August, 1915, personally appeared before me, a Notary Public in and for the County and State aforesaid, G. B. Eckles, to me known to be a Resident Vice President of the American Surety Company of New York, who being by me duly sworn did depose and say: that he resided in the City of Salt Lake, State of Utah; that he is

Resident Vice President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; and that he signed his name thereto by like order; that said corporation has complied with Chapter Eleven of the Idaho Revised Codes and all other laws of the State of Idaho relating to surety companies and has also complied with the Act of Congress approved August Thirteenth, A. D. 1894, entitled: "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon," as amended March 23, 1910; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said G. B. Eckles further said that he was acquainted with Wm. R. Werb and knew him to be one of the Resident Assistant Secretaries of said corporation; that the signature of said Wm. R. Werb subscribed to the said instrument is in the genuine handwriting of the said Wm. R. Werb and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said G. B. Eckles, Resident Vice President. Affiant further says that the Insurance Commissioner of the State of Idaho, whose address is Boise, Idaho, has been appointed attorney upon whom process for the State of Idaho may be served according to law.

G. B. ECKLES,

Subscribed and sworn to before me this 21st day of August, 1915.

CORA BEATTY,
Notary Public.

Endorsed: Filed August 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

Undertaking on Appeal.

Know All Men By These Presents, That we, Sunnyside Irrigation District, a corporation, as principal, and the American Surety Company of New York, a corporation, as surety, are held and firmly bound unto J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells, as co-partners, and impleaded in the above entitled cause as Maney Brothers & Co., in the sum of Two Hundred and No-hundredths Dollars, lawful money of the United States of America, to be paid to the several co-partners above named, their and each of their administrators, heirs and assigns, to which payment well and truly to be made, we bind ourselves and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of August, A. D. 1915.

Whereas, The above-named defendant, Sunnyside Irrigation District, a corporation, obtained in open court an order allowing its appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from a decree in favor of the above-named co-partners, under the name of Maney Brothers & Co., against the property of this cross-defendant, and of

the cross-defendant, Crane Creek Irrigation District, rendered in said District Court on the 12th day of June, A. D. 1915, to reverse the said decree, and

Whereas, The said United States District Court has fixed the sum of a bond on said appeal as surety for all costs and damages, in the sum of Two Hundred and No-hundredths Dollars,

Now, Therefore, The condition of this obligation is such that if said Sunnyside Irrigation District shall prosecute its said appeal to effect and shall answer all damages for delay and costs and interest on said appeal, if it fails to make its said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and effect.

In Witness Whereof, The parties aforesaid have caused their corporate names to be hereunto subscribed, and their corporate seals attached by the proper officers in that behalf duly authorized.

(Seal) SUNNYSIDE IRRIGATION DISTRICT,
By August Brockman, President.

Attest: Ed R. Coulter, Secretary.

(Seal)

AMERICAN SURETY COMPANY OF NEW YORK,

By G. B. Eckles, Resident Vice President.

Wm. R. Werb, Resident Assistant Secretary.

B. S. Varian, Resident Agent.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety, this 28th day of August, A. D. 1915.

FRANK S. DIETRICH,
District Judge.

(Title of Court and Cause.)

Statutory Affidavit for Corporate Surety. Idaho.

State of Utah,

County of Salt Lake,—ss.

On the 21st day of August, 1915, personally appeared before me, a Notary Public in and for the County and State aforesaid, G. B. Eckles, to me known to be a Resident Vice President of the American Surety Company of New York, who, being by me duly sworn, did depose and say: that he resided in the city of Salt Lake, State of Utah; that he is Resident Vice President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; and that he signed his name thereto by like order; that said corporation has complied with Chapter Eleven of the Idaho Revised Codes and all other laws of the State of Idaho relating to surety companies and has also complied with the Act of Congress approved August Thirteenth, A. D. 1894, entitled: "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon," as amended March 23, 1910; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said G. B. Eckles further said that he was acquainted with Wm. R. Werb and knew him to be one of the

Resident Assistant Secretaries of said corporation; that the signature of said Wm. R. Werb subscribed to the said instrument is in the genuine handwriting of the said Wm. R. Werb and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said G. B. Eckles, Resident Vice President. Affiant further says that the Insurance Commissioner of the State of Idaho, whose address is Boise, Idaho, has been appointed attorney upon whom process for the State of Idaho may be served according to law.

G. B. ECKLES.

Subscribed and sworn to before me this 21st day of August, 1915. CORA BEATTY,
Notary Public.

Endorsed: Filed August 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, the 23rd day of August, 1915.

Present: Hon. Frank S. Dieetrich, Judge.

PORTLAND WOOD PIPE COMPANY

vs.

SLICK BROTHERS CONSTRUCTION COMPANY, a Corporation, CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, a Corporation, SUNNYSIDE IRRIGATION DISTRICT, a Corporation, et al.

No. 511.

Now comes the defendants, the Crane Creek Irrigation District and Sunnyside Irrigation District, by their Solicitors, and in open Court severally present their petitions for an allowance of an appeal from a final decree of this Court made and filed in this cause on the 12th day of June, 1915, to the Circuit Court of Appeals for the Ninth Circuit and for fixing the amount of a bond in each case to act as a bond for costs; and it appearing that said petitions are in form and that each of the said defendants has presented and filed their assignment of errors, it is ordered that the appeals in each case be, and the same is, hereby allowed and the bond in each case is fixed in the sum of $200.00 to act as a bond for costs.

CITATION.

The United States of America.—ss.

To CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, CRANE CREEK IRRIGATION LAND AND POWER COMPANY, E. D. FORD, A. G. BUTTERFIELD and R. C. McKINNEY:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty (30) days from the date of this Writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho,

Southern Division, wherein Maney Brothers & Co. (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), is cross-complainant, and you, Crane Creek Irrigation District, Sunnyside Irrigation District, Portland Wood Pipe Company, Crane Creek Irrigation Land and Power Company, E. D. Ford, A. G. Butterfield and R. C. McKinney, and others, are cross-defendants, to show cause, if any there be, why the judgment, order or decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 14th day of August, A. D. 1915, and of the Independence of the United States the one hundred and fortieth year. FRANK S. DIETRICH,

(Seal) District Judge.

Attest: A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

Service of the foregoing Citation and receipt of a copy thereof admitted this 16th day of August, 1915.

C. S. VARIAN,
ED R. COULTER,
Solicitors for Crane Creek Irrigation District and Sunnyside Irrigation District.

B. S. VARIAN,
Solicitor for Crane Creek Irrigation, Land and Power Company, E. D. Ford, A. G. Butterfield and R. C. McKinney.

EDWIN SNOW,
Solicitor for S. C. Comerford.
RICHARDS & HAGA,
Solicitors for Portland Wood Pipe Company and Slick Brothers Construction Company.
Filed August 23rd, 1915.

RETURN TO RECORD.

And thereupon it is ordered by the Court, that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest: A. L. RICHARDSON,
Clerk.
By PEARL E. ZANGER, Deputy.
Deputy.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 244 inclusive, to be full, true and correct copies of the pleadings and proceedings, in accordance with the praecipes on file herein, in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $283.90 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 30th day of August, 1915.

A. L. RICHARDSON,
Clerk.
By PEARL E. ZANGER, Deputy.
Deputy.

No. 2644.

United States
Circuit Court of Appeals
For the Ninth Circuit

MANEY BROTHERS & CO. (a Co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Appellants*,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, Limited, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD and R. C. McKINNEY, *Appellees.*

CRANE CREEK IRRIGATION DISTRICT and SUNNYSIDE IRRIGATION DISTRICT, *Cross-Appellants*,

vs.

MANEY BROTHERS & CO. (a Co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Cross-Appellees.*

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

RICHARDS & HAGA, and
McKEEN F. MORROW,
Solicitors for Appellants,
Residence: Boise, Idaho.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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CRANE CREEK IRRIGATION DISTRICT and SUNNYSIDE IRRIGATION DISTRICT, *Cross-Appellants*,

vs.

MANEY BROTHERS & CO. (a Co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), *Cross-Appellees.*

BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

This is an appeal from a decree foreclosing a mortgage of Maney Brothers & Co., and a mechanic's lien of the Portland Wood Pipe Company on an irri-

gation system commonly known as the Crane Creek Project, situated near Weiser, Washington County, Idaho. The facts, so far as material to this appeal, are substantially as follows:

The appellee, Crane Creek Irrigation Land & Power Company (hereinafter called the "Crane Creek Company") and its President and promoter of the enterprise, Mr. E. D. Ford, sometime prior to August 22, 1910, and shortly thereafter acquired a number of water rights and the necessary lands for rights of way for the reservoir and irrigation system described in the pleadings and record and involved in this appeal. The irrigation project was so situated that it would irrigate lands in what is known as the Sunnyside Irrigation District and in the Crane Creek Irrigation District, appellees and cross-complainants, as well as a considerable body of land situated outside the boundaries of either District.

On August 22, 1910, the Crane Creek Company entered into separate contracts with the two Irrigation Districts, the contracts being similar in form and terms except as to the percentage or interest in the irrigation system to be conveyed to the District upon the completion of the project. The contract with the Sunnyside Irrigation District is set out in full in the record (trans., pp. 101-121) and provides for the conveyance to that District of an undivided 35.26% interest in the system (later increased to 47.2%). The contract with the Crane Creek Irrigation District was entered into on the same date and is identical in every respect, except that it provides

for the conveyance to that District of an undivided 21.75% interest in the system. (Later increased to 22.4%).

At the time these contracts were entered into the irrigation project had not been constructed, in fact no work had really been done on the system, but under the contracts referred to the works were to be completed by the first day of May, 1912 (trans., par. VI, p. 107); and the Crane Creek Company was to accept in payment of the interests to be conveyed to the Districts the bonds of the Districts, to be delivered in installments as the work progressed.

The first construction work on the project was done by appellants, Maney Brothers & Co., who on September 29, 1911, entered into a contract with the Crane Creek Company for the construction of the reservoir at a price of approximately $87,000.00. (trans., p. 90). The Crane Creek Company, being without funds to pay for the construction work at that time, the contract with Maney Brothers provided that a mortgage should be given upon the entire irrigation project, including the reservoir to be constructed by appellants under said contract, and upon all the water rights and rights of way for the reservoir and canals, and upon certain farm lands owned by the Crane Creek Company. The mortgage specifically covers the contracts between the Crane Creek Company and the Irrigation Districts, dated August 22, 1910, and all moneys to be paid or bonds to be delivered thereunder. And on the same date, viz., September 29, 1911, the

Crane Creek Company made, executed and delivered to Maney Brothers its mortgage covering the property above referred to (Trans., exhibit A, p. 29); and a few days thereafter, viz., on October 6, 1911, the mortgage was filed for record in the office of the County Recorder of Washington County. The Districts were promptly advised of the arrangement with Maney Brothers and the giving of the mortgage, and had actual notice of Maney Brothers relation to the system and the mortgage referred to, as well as record notice thereof (trans., p. 165).

The reservoir was completed by Maney Brothers pursuant to their contract, and no work has been done thereon by any one else. The reservoir is situated some distance from the balance of the irrigation system, the water being turned out of the reservoir into the main channel of Crane Creek and flows down the channel of Crane Creek for several miles before it reaches the head works of the canals which constitute the balance of the irrigation system (Trans., p. 165). No work on the project was done after Maney Brothers completed the reservoir until April, 1913, when a contract for the construction of the canals and laterals, flumes and other structures was entered into between the Crane Creek Company, and Slick Brothers Construction Company, Limited; and the project was completed under said contract and extensions thereof about July or August, 1914.

The appellee, Portland Wood Pipe Company, furnished material under the contract with Slick Broth-

ers Construction Company, and filed notice of lien and afterwards commenced a suit for the foreclosure of the lien, to which suit Maney Brothers & Company and numerous other parties were made defendants. Maney Brothers & Co. filed answer to the bill foreclosing the lien of the Portland Wood Pipe Company and by cross-bill sought the foreclosure of their own mortgage.

The record is undisputed that the Districts made no payment whatever for any interest in the irrigation system until April 13, 1913, when the Sunnyside Irrigation District delivered to the Crane Creek Company $151,000.00 par value of its bonds, and on the same date the Crane Creek District delivered to the Company $99,000.00 par value of its bonds. These bonds were delivered to the Crane Creek Company in payment for an interest in the reservoir constructed by Maney Brothers under their contract and covered by their mortgage, dated September 29, 1911 (trans., p. 160). From time to time after April, 1913, the Irrigation Districts delivered bonds to the Crane Creek Company pursuant to estimates of engineers as the construction work progressed, in payment for certain undivided interests in the reservoir, canals, and water rights described in Maney Brothers mortgage, and upon which that mortgage purported to be a first and prior lien. At various times after the giving of that mortgage the Crane Creek Company and the Districts modified and changed, without the consent of Maney Brothers, the contracts of August 22, 1910.

The first deed to each District was dated May 29, 1913. The deed to the Sunnyside District is set out in full in the record (trans., p. 168). The deeds to the Crane Creek District were identical, except as to the proportionate interest conveyed to that District. Thirteen deeds in all were given to each District. The last deed bears date of August 15, 1914. None of the deeds were recorded, except the first deed, and that was recorded on the 19th day of November, 1914 (trans., p. 167).

The lien and priority of Maney Brothers mortgage was never disputed or questioned by the Districts until this suit was commenced; but on the contrary certificates and resolutions were issued and passed by the District officers and the Board of Directors acknowledging the priority and validity of Maney Brothers mortgage as a lien upon the entire irrigation system. (See Maney Bros. exhibit 5, trans., p. 154, and Maney Bros. exhibit 6, trans., p. 157.)

Decree was entered on June 12, 1915, giving the Portland Wood Pipe Company a lien upon the entire irrigation system, subsequent to Maney Brothers mortgage as to the interest in the system not yet conveyed by the Crane Creek Company, but prior to the mortgage, as to that part of the system conveyed to the Irrigation Districts, and giving Maney Brothers & Co. a first lien under their mortgage on the interest in the system still retained by the Crane Creek Company, but no lien whatever upon the interest in the system conveyed by the Company to the Districts, and holding in effect that as the original

contracts between the Company and the Districts had been entered into prior to the giving of the mortgage the Districts were not affected by the mortgage and could ignore the interest of the mortgagee in making payments to the Crane Creek Company and in otherwise dealing with that Company relative to the project, and that they had the right to pay off mechanic's liens against their interests in the system in bonds or the proceeds of the bonds to be delivered to the Crane Creek Company. The Court further declined to give any effect whatever to the certificates or resolutions issued and passed by the Districts, to the effect that the validity of Maney Brothers mortgage upon the entire system was conceded and that the Districts had no defense thereto.

The Court further declined to allow Maney Brothers more than $1,000.00 as attorney's fees for the foreclosure of the mortgage, for the reason that the contest resulted mainly from the attempt of Maney Brothers to enforce their lien against the interests in the system conveyed to the Districts, upon which issue he held in favor of the Districts. At the time of the decree there was due Maney Brothers & Co., under their mortgage, $40,140.00, and the Portland Wood Pipe Company $11,244.30.

SPECIFICATION OF ERRORS.

The errors are specified in detail in the assignment of errors, pages 212 to 217 of the record. Stated generally, they are:

1. That the Court erred in not decreeing that Maney Brothers had a first and prior lien upon the interest of the Crane Creek and Sunnyside Irrigation Districts in the reservoir, rights of way, water rights and irrigation works conveyed to them by the Crane Creek Company under the deeds made from time to time, commencing on May 29, 1913, and ending August 25, 1914, all of which were made long after the execution and delivery of the mortgage from the Crane Creek Company to Maney Brothers covering the same property, and of which the Districts had full notice.

2. That the Court erred in holding that the Sunnyside Irrigation District took title to 47.2% interest in the irrigation system, reservoir, water rights and rights of way free of Maney Brothers mortgage lien, and that the Crane Creek District took title to an undivided 22.4% interest in the same system free of such mortgage lien.

3. That the Court erred in holding and deciding that the certificate and resolution executed, issued and passed by the officers and Board of Directors of the Irrigation Districts, conceding the validity and priority of the lien of Maney Brothers mortgage, were ineffectual and without force and effect.

4. That the Court erred in holding and deciding that the Irrigation Districts had the right to apply the bonds, or the proceeds of the bonds, which were to be given the Crane Creek Company in payment for their interests in the irrigation system, to the satisfaction of mechanics' liens and other claims

against the system without regard to Maney Brothers' mortgage, and that after paying such mechanics' liens and claims no balance remained of the purchase price that could be applied to the reduction of Maney Brothers' mortgage.

5. That the Court erred in decreeing that Maney Brothers were only entitled to attorneys' fees in the sum of $1,000.00 for the foreclosure of their mortgage, when the record shows that the reasonable attorney's fee in such cases would be from $2,500.00 to $3,000.00.

6. That the Court erred in not entering a decree giving Maney Brothers a first and prior lien upon all of said irrigation system, rights of way, water rights and irrigation structures.

For a more particular statement of the errors assigned and relied upon on appeal, reference is made to the Assignment of Errors contained in the record (trans., pp. 212-217).

POINTS AND AUTHORITIES.

Mechanics' liens are entirely statutory and they can have only such dignity and priority as the statute confers upon them.

2 Jones, Liens, Sec. 1184.

Courts of Equity are without power to displace vested mortgage liens in favor of liens of contractors, laborers or material men.

Allis-Chalmers Co. v. Central Trust Co., 111 C. C. A. 428, 190 Fed. 700, 705.

Kneeland v. American Loan Co., 136 U. S. 89, 97, 34 L. ed. 379.

Vested mortgage liens upon real estate, water rights or rights of way for irrigation works cannot under the Idaho statutes be displaced by liens of contractors, laborers, or material men, who perform labor or supply material for improvements on such property under contracts entered into subsequent to the recording of the mortgage, or after actual notice of the mortgage.

Idaho Rev. Codes, Sec. 5114.

Pacific States, etc., Co. v. Dubois, 11 Ida. 319, 83 Pac. 513.

A valid mortgage lien may be created on after-acquired property, and, when the mortgage so provides, the mortgage lien attaches instantly upon the vesting of title, legal or equitable, in the mortgagor.

Mitchell v. Winslow, Fed. Cas. No. 9673.

Galveston H. & H. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199.

A vested mortgage lien cannot be displaced by acts of the mortgagor or by mechanics' liens arising under subsequent contracts for construction of improvements on the mortgaged property, except in the case of after-acquired property where the lien may have attached before the mortgagor acquires title to the property.

Bear Lake & River Water Works & Irr. Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327.

Garland v. Irrigation Co., 9 Utah 350, 34 Pac. 368.

Creer v. Cache Valley Canal Co., 4 Ida. 280, 38 Pac. 653.

The vendor under an executory contract of sale holds the legal title as security for the performance of the vendee's obligation, and the title or interest so held by the vendor may be conveyed, mortgaged or devised.

Taylor v. McKinney, 20 Cal. 620.

Gessner v. Palmater, 89 Cal. 89, 24 Pac. 608.

39 Cyc. 1664.

3 Pomeroy Eq., Sec. 1261.

1 Pomeroy Eq., Secs. 368, 372.

39 Cyc. 1301.

Where the vendor under an executory contract of sale has mortgaged his interest in the property, no act of the vendor or vendee thereafter can prejudice the right of the mortgagee.

Lamm v. Armstrong, 95 Minn. 434, 104 N. W. 304; 111 Am. St. Rep. 479; 5 A. & E. Ann. Cas. 418.

Smith v. Jones (Utah), 60 Pac. 1104.

Bartlesville Oil Co. v. Hill, 30 Okla. 829, 122 Pac. 208.

Younkman v. Hillman, 53 Wash. 661, 102 Pac. 773.

Land is not made inalienable merely by contracting to sell it, and every purchaser of land under an

executory contract of sale pays at his peril if he pays the purchase money to the vendor after he has mortgaged or assigned his interest in the property.

Laughlin v. North Wisconsin Lbr. Co., 176 Fed. 772.

Same case affirmed on appeal, 193 Fed. 367.

Southern Building Assn. v. Page, 46 W. Va. 302, 33 S. E. 336.

Mutual Aid, etc., Co. v. Gashe, 56 Ohio 273, 46 N. E. 985.

Georgia St. Assn. v. Faison, 114 Ga. 655, 42 S. E. 760.

Ten Eick v. Simpson, 1 Sandf. Chanc. (N. Y.) 244.

Elliott v. Delaney, 217 Mo. 14, 116 S. W. 494.

Tait v. Reid (Ia.) 139 N. W. 1101.

Minaker v. Sunset, etc., Assn., Cal. App., 145 Pac. 542.

Fargo v. Wade (Ore.), 142 Pac. 830.

Wright v. Troutman, 81 Ill. 374.

Lowery v. Peterson, 75 Ala. 109.

Adams v. Cowherd, 30 Mo. 458.

Russell v. Kirkbride, 62 Tex. 455.

McClintic v. Wise's Administrators, 25 Gratt. 448.

The doctrine of relation cannot be invoked in favor of a vendee under an executory contract of sale so as to cut off the equities of the vendor's mortgagee.

1 Devlin on Real Estate, Sec. 264.
Butler & Baker, 3 Coke Rep. 25, 29b.
Jackson v. Davenport, 20 Johns. (N. Y.) 536.
Murphree v. Countiss, 58 Miss. 712.
Jackson v. Bard, 4 Johns. 230, 4 Am. Dec. 267.
Barnes v. Cox (Neb.), 79 N. W. 550.
Rogers v. Heads Iron Foundry (Neb.), 70 N. W. 527.
39 Cyc. 1557.
Tomlinson v. Blackburn, 37 N. C. 509.
O'Neil v. Wabash Ave. Church, Fed. Cas. No. 10531.

A representation of future intention, absolute in form, made for the purpose of influencing the conduct of the other party and acted upon by him, is sufficient to raise an estoppel.

2 Pomeroy Equity Jur., Sec. 877 note.
Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618.
Seymour v. Oelrichs, 156 Calif. 782, 106 Pac. 88.
Faxton v. Faxton, 28 Mich. 159.

A representation as to the future operates as an estoppel where it relates to an intended abandonment of an existing right and is made to influence others and has induced them to act.

Union, etc., Life Ins. Co. v. Mowry, 96 U. S. 544, 25 L. Ed. 674.

Banning v. Kreiter, 153 Cal. 33, 94 Pac. 246.

American Surety Co. v. Ballman, 52 C. C. A. 204, 115 Fed. 292.

There is not one rule of morals for municipal corporations and another for individuals, and the former may be estopped just as the latter may be.

Boise City v. Wilkinson, 16 Ida. 150, 178, 102 Pac. 148.

Portland v. Inman-Poulsen Lumber Co. (Ore.) 133 Pac. 829.

Board v. Denver, 30 Colo., 13, 69 Pac. 586.

Hubbell v. Hutchinson, 64 Kan. 645, 68 Pac. 52.

Indiana v. Milk, 11 Fed. 389.

ARGUMENT.

No question has been raised as to the validity of Maney Brothers' mortgage. It is conceded that it was properly authorized and executed by the mortgagor, Crane Creek Irrigation Land & Power Company, and that it was recorded in the proper County immediately after its execution, and that the appellees and cross-appellants, Crane Creek Irrigation District and Sunnyside Irrigation District, have had actual as well as constructive notice of the existence of the mortgage from the time it was executed.

Mr. E. R. Coulter, testifying on behalf of the Irrigation Districts (trans., pp. 100-101), stated that he was Secretary of one of the Districts and had

been since April, 1913, and that he was and had been attorney for both Districts since their inception, and was familiar with all their transactions from the very inception of the Districts to the present time. And on cross-examination he said (trans., pp. 159-160):

> "I have frequently talked, and I have had frequent conversations with Mr. E. G. Wells, of Maney Brothers & Co., relative to that mortgage and know that they hold a mortgage on this property belonging to the Crane Creek Irrigation Land & Power Company. In fact, the mortgage is a matter of record in Washington County."

Mr. E. D. Ford, also a witness for the Districts, testified on cross-examination (trans., pp. 165-166):

> "I discussed with the two Districts and their Board of Directors from time to time the financial arrangements that were made from time to time and the failure of those who contracted to buy the bonds to take them as they had agreed, and the difficulties that resulted from that. I kept the Districts fully advised of my progress and of the negotiations and contracts that I made for the construction of these works and for the sale of these bonds, and it was because of those negotiations and those contracts that I got extensions from time to time from the Districts for the completion of these works. I advised the Districts of the giving to Maney Brothers of that mortgage on the system about the time it was given."

In fact, there does not appear to be any dispute over the facts on any matter involved on this appeal. It is purely a question of law as to the right of the Irrigation Districts to totally and completely ignore Maney Brothers' mortgage and deal with the mortgagor, after the mortgage had been given, relative to the mortgaged property as if no mortgage existed, and to modify, extend, and change their contracts for the purchase of the mortgaged property and take conveyances from the mortgagor of the mortgaged property without regard to the existence of the mortgage or the rights of the mortgagee.

The trial court held that the Districts had the right to see that the purchase price "was applied to the discharge of the superior liens; those of contractors, laborers and of material men," all of whom entered into their contracts for furnishing such labor and material long after the mortgage had been given and placed of record, and with full notice and knowledge of the existence of such mortgage. The only right that the trial court recognized in the mortgagees appears to be summed up in the unprofitable assumption stated in the decision that (trans., p. 189):

> "If we assume that thereafter (after seeing that the purchase price was applied to the discharge of liens and claims of contractors and material men) it was their duty to withhold from the vendor and pay to mortgagees the balance, it need only be said that there is no showing that there was any balance."

It is difficult to conceive of a mortgage being so flimsy, unsubstantial and precarious as the trial court held this mortgage to be. At most, said the Court, the mortgagees would be entitled only to the balance after others had been paid. The amount to be paid material men and other contractors was fixed without consultation with or the consent of the mortgagees. The price for which the bonds were sold by the Crane Creek Company and the Districts was likewise fixed or determined without the knowledge or consent of the mortgagee. The only right recognized in the mortgagees was that it might possibly have some claim to the residue or balance remaining after contractors and material men had been paid what the mortgagor saw fit to pay them out of the proceeds of bonds sold at a price satisfactory to the mortgagor and the Districts. The mortgagees were apparently the only ones that had no voice in what should be done with the mortgaged property.

The law gives to mortgages and contract liens greater dignity and a higher standing than the trial court accorded to appellants' mortgage in this case. It is only in extraordinary cases that any court has been permitted to displace to the slightest degree the priority of mortgage liens. Courts of equity have invariably avoided taking any action in determining the equities between litigants that would tend to destroy the sacredness of contract obligations. There is but one exception that has been recognized by the courts as a ground for not giving ef-

fect to a mortgage according to its terms, and that is in the case of receiverships of railroads and a few other similar public service corporations, where the mortgage covers earnings and income; but the courts have, for reasons that seem amply justified in such cases, permitted the use of such earnings for the payment of bills incurred from four to six months before the receivership for labor and material necessary to keep the concern going. But even in such cases the Courts have been careful to recognize the vested rights of mortgagees.

The Supreme Court of the United States, in discussing the power of a court of equity to use the earnings or income of a railroad corporation for the payment of labor and material claims incurred immediately prior to the receivership, said in Kneeland vs. American Loan & Trust Co., 136 U. S. 89, 34 L. Ed. 379, 383:

> "No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

And the Circuit Court of Appeals of the First Circuit, 190 Fed. 700, 705, in discussing the relative priorities of mortgages and mechanics' liens where bonds had been delivered before but not certified until after the contract of the lien claimants was entered into, said:

> "Whoever takes construction work upon property subject to a recorded mortgage must be assumed to have relied upon the personal responsibility of the other party to the contract and upon such liens as the statute grants in definite terms, and not upon the expectation of displacing the priority of mortgage liens. *The argument that there is some sort of superior equity in claims for work and materials over liens for money previously advanced upon mortgage is without merit and the chancellor cannot apply such a principle either to displace vested liens or to broaden a lien statute by a construction which disregards absolutely the rights in a mortgage security.*" (Our italics.) (Allis Chalmers Co. vs. Central Trust Co.)

The necessity of respecting the priority of mortgage liens was recognized by the Legislature of the State of Idaho, for the statutes of that State provide, and have provided for many years, that mechanics' liens shall be subject and subordinate to mortgages executed and recorded before the labor or material was furnished. Section 5114 of the Idaho Revised Codes, relative to the dignity and priority of mechanics' liens and mortgages, reads as follows:

"The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other encumbrance, of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished."

The Supreme Court of Idaho in construing this statute, in Pacific States, etc. Co., vs. Dubois, 11 Ida. 319, 325, said:

"All liens for labor commenced and materials commenced to be furnished prior to recording said mortgages are prior and superior liens to said mortgages, and the liens of all laborers for labor commenced, and of material men for material commenced to be furnished, subsequent to the recording of said mortgages, are subordinate to said mortgages, when such work is done and material furnished by persons not theretofore connected with the construction of the building. If that were not intended, why did not the Legislature simply say that all liens for labor and material furnished in the erection or construction or repair or change of a building took effect from the commencement of the construction of such building or of such repair or changes? It is clear to me that the Legislature in-

> tended to make all liens for work commenced and materials commenced to be furnished after the recording of a mortgage subsequent and inferior thereto, especially when such work is done and materials furnished by persons who had no connection with the erection of the building until after the recording of the mortgages."

Mechanics' liens are entirely statutory, and they can have only such dignity and priority as the statute confers upon them. There is no principle of equity upon which mechanics' liens can be preferred to mortgages. In fact the commercial law of the country would be entirely unsettled if contract or mortgage liens could be displaced whenever the chancellor thinks some other party, although later in time, has acquired a superior equity through some service rendered or materials furnished the mortgagor.

In the case at bar Maney Brothers & Co., the mortgagees, constructed the reservoir. No work whatever upon that structure has been done by any one except Maney Brothers. Not one dollar was paid them for such construction, but instead of filing a mechanics' lien they arranged in advance that they should have a first mortgage lien upon the structures so constructed by them, as well as upon the water rights, rights of way and other property owned by the mortgagor. Subsequently some payments were made upon the mortgage until the amount was reduced to about $40,000.00, with interest.

By the decision of the trial court the mortgage lien of Maney Brothers is practically displaced as to

the entire reservoir, and the lien of others, who did not contribute in any way towards its construction, is attached to that property and the property is permitted to be conveyed to the Districts free and clear of encumbrances. It should be noted that the decree provides that the interest of the Districts in the reservoir is such as to leave practically no interest in the present structure subject to Maney Brothers' mortgage. (See Par. VIII of Decree, Trans. pp. 209-210.)

In this connection we desire to call attention to the fact that the canals and works constructed by other contractors, (and such construction work did not commence until some eighteen months after the mortgage had been given and placed of record), are entirely separated from and in no way connected with the reservoir.

There can be no important controversy here between appellants and the mechanics' lien claimants. Their relative priority and relation are determined by the Idaho statute quoted above and the decision of the Idaho Supreme Court construing such statute, and the many decisions of the courts holding that the rights of a mortgagee are as much entitled to consideration in equity as the rights of mechanics' lien claimants.

The Court in Allis-Chalmers Co. vs. Central Trust Co., of New York, 190 Fed. 701, 705 (C. C. A.) states the law correctly on this subject when it says:

> "The argument that there is some sort of superior equity in claim for work and material

over liens for money previously advanced upon mortgage is without merit, and the chancellor cannot apply such principle either to displace vested liens or to broaden a lien statute by a construction which disregards absolutely the rights in a mortgage security."

We find no authority for the statement in the opinion of the learned Judge in the court below (Trans., p. 189), "That the lien of those who, by supplying labor and material created the property, * * * was superior to the mortgage lien is scarcely open to controversy." This statement of the law is directly contrary to the statutes of the State and the decisions of the Idaho Supreme Court, and we believe no support for such a doctrine can be found anywhere.

Again we call the attention of the Court to the facts. Appellants constructed the reservoir, commencing about the first of October, 1911, and took a mortgage upon all the property of the Crane Creek Company for the cost of such construction. The contract with Slick Brothers' Construction Company was entered into in April, 1913, with full notice of the mortgage. The contract covered the construction of canals, laterals, pipes, siphons and flumes all situated miles away from the reservoir which appellants had constructed, and all situated on lands and rights of way owned by the Crane Creek Company and covered by appellants' mortgage given some eighteen months before Slick Brothers' contract was entered into. Before any structures were built on

these rights of way appellants' mortgage was admittedly a first and prior lien on such lands and rights of way and on the water rights under which water was being stored in the reservoir.

The entry of the contractors and material men upon the mortgaged property surely could not operate to displace the mortgage lien. Such is not the law in the case of mortgages on farms, town lots or railroads, and the mortgage lien in the one case is as sacred, binding and effectual as in the other.

It is not clear on what theory the District Court held that appellants were not entitled to a mortgage lien upon the interests in the irrigation system conveyed to the Districts. There are some statements in the opinion from which we infer that the learned trial Judge applied the doctrine of relation in such a way as to hold that because the Districts had entered into an executory contract prior to the giving of the mortgage to purchase such interest, provided the works were completed according to specifications and within a certain time, they could ignore the mortgage and deal with the mortgagor as if the mortgage did not exist, and make payment to the mortgagor direct or to the mechanics' lien claimants. There are also statements in the opinion that indicate that the court considered that the mechanics' lien claimants had a prior and superior lien to appellants' mortgage, not only as to the canals and structures upon which work was performed by such claimants, but also as to the reservoir—an independent structure—constructed by the appellants, and that the Districts

could pay the mortgagor direct and if the mortgagor used the purchase price, or the proceeds of the bonds, in the discharge of such mechanics' liens and no residue or balance remained for application on the mortgage, the lien of the mortgage would cease when the funds were exhausted; and the Court suggests that appellants have no grievance against the Districts for the reason that there is no evidence that there was any residue or balance, thus apparently throwing the burden of proof on appellants of showing that the mortgagor and the Districts had not expended all the proceeds from the sale of the District bonds for the satisfaction or discharge of valid mechanics' liens.

The court says in its opinion, (Trans. p. 189):

> "It was the right of the Districts to see that the purchase price was applied to the discharge of the superior liens; those of contractors, laborers and of material men. If we assume that thereafter it was their duty to withhold from the vendor and pay to the mortgagees the balance, it need only be said that there was no showing that there was any balance."

No authorities are cited in support of this view, but in the forepart of the opinion, in connection with another phase of the litigation, reference is made to two cases, resting, however, upon an entirely different principle of law not at all applicable under the facts of this case, and it may be that the court based the statement quoted above upon a supposed analogy

to the cases previously cited, viz: Creer vs. Cache Valley Irrigation Co., 4 Ida. 280, 38 Pac. 653, and Garland vs. Irrigation Co., 9 Utah 350, 34 Pac. 368. Neither of these cases is in point. The decision in those cases rests upon an entirely different principle of law. There the canals in question were constructed over the vacant, unoccupied, and unappropriated public domain and the title of the mortgagor to the rights of way and canals in question rested wholly upon Sections 2339 and 2340 of the United States Revised Statutes, and under those statutes the title did not pass to the mortgagor until the canals had been constructed, and the title therefor came to the mortgagor with the lien of the contractor's already impressed upon the property, for the lien of the contractors attached from the beginning of the construction and attached as the construction proceeded; whereas the title from the Government to the Company did not pass until the canals had been completed.

In those cases the courts clearly recognized the distinction between property created by the contractors and to which mortgagor did not acquire title until after it was created, and similar property created upon the rights of way and lands owned by the mortgagor before the improvements were made.

In the case at bar the mortgage in the strongest terms covers after-acquired property and improvements built upon the rights of way owned by the Company, and there can be no question as to the validity of a mortgage on after-acquired property.

Neither is there any question about the canals and structures being built upon rights of way either acquired directly in the name of the Crane Creek Company or in the name of E. D. Ford, and by him conveyed to the Company. The rights of way over the Government land were acquired directly from the Government by the filing in the United States Land Office of maps and applications therefor as required by the Act of January 21, 1895, (28 Stat. L. 635) and the amendments thereto and the rules and regulations of the Department of the Interior; and rights of way over the private lands were acquired by deeds from the owners. (See plaintiff's Exhibits 3, 4, 5, 6, 13, 25 to 33, inclusive).

The mortgage provides that the mortgagor "has granted, bargained, sold, conveyed, assigned, transferred and set over * * * all property (whether real, personal, or mixed) which the said mortgagor now has or may hereafter acquire, and particularly the following described property, to-wit: (here follows description of reservoir site and the rights of way therefor acquired by approval of application by Thomas Ryan, Acting Secretary of the Interior, October 26, 1907) * * * (b) All canals, ditches, headgates, flumes, pipe lines, laterals and other structures, dams and works * * * now owned or constructed, or which may hereafter be acquired or constructed by the mortgagor, with the rights of way therefor * * *. To have and to hold all and singular the above described real, personal and mixed property * * * water rights and permits, rights

of way, reservoirs, dams, canals, flumes, pipe lines, ditches and other structures forming a part of said irrigation system now owned by the mortgagor, or hereafter constructed or acquired by the mortgagor, with all the easements, rights of way, privileges, and appurtenances thereunto belonging, or in any wise appertaining." (Trans. pp. 29-34).

We deem it necessary to cite but a few of the many authorities on the subject of a mortgage of this character covering property acquired or created after the execution of the mortgage.

In the case of Mitchell vs. Winslow, Fed. Cas. No. 9673, Mr. Justice Story said:

> "It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy."

In Galveston H. & H. R. Co., vs. Cowdrey, 11 Wall, 459, 20 L. Ed. 199, 206, the Court said:

> "As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first,

second and third deeds of trust, or mortgages, given by the Galveston Railroad Company to the trustees, estops the Company, and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the Company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely be given thereon."

If a mortgage or a railroad right of way, which includes after-acquired property, will cover all the structures built upon such right of way as against lien claimants who have built the road, manifestly the case of an irrigation project can not be distinguished.

An examination of the opinions of the Supreme Court of the United States and of the Supreme Court of Utah in the Garland case shows clearly that those

decisions rest upon a single exception to the rule, based entirely and solely upon the fact that the structures were built by the mechanics' lien claimants upon public lands where no rights of way had been acquired and where title to the structures passed to the mortgagor under the provisions of Section 2339 and 2340 of the Revised Statutes of the United States.

The Supreme Court of Utah said (34 Pac. 368, 370):

> "*When mechanics, material men, or other persons make improvements on land on which there is a mortgage or trust deed, such mortgage or trust deed will be superior to the lien to secure the mechanics or other persons;* but the water and irrigation company had no ditch or canal which the deed of trust could transfer to the trustees, until Corey Bros. & Co., by their labor, brought it into existence, and as fast as they constructed the canal their lien attached to it. The trust deed could not transfer the canal from the water and irrigation company to the trustee until it was constructed; until the property came into existence. Under the mechanic's lien law relied upon, we do not think a man can execute a deed of trust on a canal to be constructed *on the public lands*, and then employ men to build it, and after they have done so, and claim the security of the lien, turn upon them, and say he had transferred the property to a trustee before their labor had brought it into existence." (Our italics.)

The Supreme Court of the United States, 41 L. Ed. 327, 335, says:

> "*The point is that the mortgagor never had any claim or title, of a legal or equitable nature, to the land upon which this work was done during the whole time that the work was going on*, and when the title did thereafter vest in the Bear Lake Company by virtue of the work done by Corey Brothers & Company, it became burdened with the lien created by virtue of the work so done upon it. *If prior to the doing of the work the Bear Lake Company had simply purchased the land, or entered into any such agreement with the owner thereof as gave it an equitable title to the same, then the property would not have come to the Bear Lake Company burdened with any lien*, and the work thereafter done upon it in the shape of digging the ditch, etc., would not have given ground for any priority of lien as against the mortgage of the Trust Company.
>
> "The material fact to remember is that the sole title to the land or the right of way, which the Bear Lake Company has, whether legal or equitable, is transferred to that company only by virtue of the work previously done upon the land by the constructors, who thereby fulfil the condition upon the performance of which such transfer or the right of such transfer depends." (Our italics.'

For the reasons hereinbefore stated, the exceptions upon which the decision in those cases rests do not

apply to the case at bar. In fact appellees have never contended that the doctrine of those cases had any application to this case, and it is not clear that the learned Judge of the court below so considered it, as they were not cited in support of the view that the mechanics' liens had any priority over the mortgage.

The appellees Crane Creek Irrigation District and Sunnyside Irrigation Districts never contended that the mechanics' liens had priority over the mortgage. Their contention was that neither the mortgage nor the mechanics' liens were valid liens against the interests conveyed by the Crane Creek Company to the Districts. Their defense against the liens and mortgage is set forth in paragraph XVII of the answers of the two Districts, (Trans. pp. 66-70, 81-86); and, briefly stated, the contention of the Districts was that they had been organized under the irrigation district laws of the State of Idaho and were public or quasi-municipal corporations; that they had issued their bonds in payment for an interest in such irrigation system; that appellants when they took their mortgage knew the public character of the Irrigation Districts, and knew that the irrigation system would be built with the view of selling an interest therein, to said appellees, and that said proposed irrigation system was, or would be, dedicated to a public use, viz., to the irrigation of lands in said Districts, and that a valid lien or mortgage could not be created by the mortgagor upon the interest in said irrigation system which it proposed or in-

tended to convey to the Districts if they complied with the terms of their respective contracts. After stating the facts as to their organization and public character and alleging that appellants had knowledge thereof and knew of the contract between the Crane Creek Company and the Irrigation Districts, the answer of each of the Districts concludes with the statement of the reasons or legal proposition upon which the appellees rest their contention that appellants' mortgage is not a lien upon the interests conveyed to the Districts. That part of the answer is as follows, (Trans., pp. 70 and 86):

> "In consideration of the premises said defendant alleges upon its information and belief that the said Crane Creek Irrigation Land & Power Company was not authorized in law to charge the property aforesaid, and as described in the said mortgage and cross-complaint herein, with the mortgage lien for the payment of the costs of construction as hereinbefore stated, and that the said cross-complainant herein, Maney Brothers & Company, a co-partnership, had no authority to so contract with the said Crane Creek Irrigation Land & Power Company, and that the said mortgage is not and cannot be charged as a lien upon or against any the lands and property therein described, which are situate within the boundaries of this defendant, Sunnyside Irrigation District, or which is necessarily connected with or required for the effectual use and operation of its said system and to that extent the same is null and void."

Appellees, therefore, based their defense squarely upon the proposition that the mortgagor was powerless to create any lien upon the property which it afterwards intended to convey to the Districts, because of the public character of such Districts and the public use to which the property would be devoted after it had been conveyed to the appellees. Upon that theory and upon those issues the case was tried and evidence introduced, and the cause argued and submitted to the court. The learned District Judge disregarded or rejected the only defense made by the Districts to the enforcement of appellants' mortgage, and there can be no question but the court was right in holding that the defense referred to was wholly insufficient in law.

In justice to appellees and their counsel, we should also say that the theory upon which the Court held the mortgage inoperative as against the interests conveyed to the Districts originated entirely with the Court after the cause had been submitted, and was not proposed or urged by appellees. The issues, therefore, which appellants are now required to meet are not the issues upon which the case was tried and submitted in the court below. The views of the court below cannot prevail. Vested rights under a valid mortgage are thereby destroyed, and the mortgagee given no protection whatsoever.

As illustrative of how appellees were permitted to play fast and loose with the mortgaged property after the mortgage was given, we call attention to the original contract of August 22, 1910, with the Sunny-

side Irrigation District, which provided that that District had the right to purchase an undivided 35.26 per cent interest in the water rights and irrigation system to be constructed by the Crane Creek Company (Trans. p. 104); whereas the decree in the case gives the Sunnyside District an undivided 47.2 per cent or nearly 12 per cent more than the contract of August 22, 1910, required the Crane Creek Company to convey to that District.

Appellants' mortgage expressly permitted the Crane Creek Company to carry out the contract of August 22nd, (Trans. p. 37) upon certain conditions which, when complied with, would entitle the Districts to a release of the mortgage as to the interests to be conveyed thereunder to the Districts. Had that contract been carried out according to its terms, and if the law were as applied by the lower court in this case, then the Crane Creek Company's interests in the system would now be substantially 12 per cent greater than it is, all of which would be under appellants' mortgage. The complete disregard of appellants' mortgage disclosed by the record, seems almost shocking and cannot be justified upon any theory.

Pages 124 to 150 of the transcript of the record are taken up with contracts between appellees, or one or the other of them, and the Crane Creek Company, modifying and changing the contracts of August 22, 1910, after the mortgage was given and all without the knowledge or consent of the mortgagee; in many cases the changes are most material. Among other things, the manner of payment was changed, and it

was agreed under a contract between the Crane Creek Company and the Districts, dated October 16, 1913, that the District bonds were to be sold at 60 per cent of their face or par value, and that the money should be deposited in the First National Bank of Weiser as Trustee for the Districts, and that such money should be paid to the Crane Creek Company only in such amounts and at such times as the Board of Directors of the District might authorize. (Trans. pp. 140-141 and 162).

If the Districts and the Crane Creek Company as late as October 16, 1913,—two years after the mortgage was given and while all parties had full notice and knowledge of the terms of the mortgage—could agree that the bonds of the Districts should be converted into cash on the basis of 60 per cent of their par value, it is not surprising that the trial court found that there was no evidence that there was any balance to apply on the mortgage.

The conclusion seems justified that, in the opinion of the trial court, the Districts had the right to pay the purchase price, direct to the mortgagor or to claimants, who had furnished labor or material towards the construction of the system, and that the mortgagees have no claim against the Districts as long as the Districts can show that they had paid to some one the full amount of the purchase price. In other words, the Districts could select the creditors of the mortgagor that should be paid, or they could pay the money direct to the mortgagor. If that be the law, then a mortgage on property subject to an execu-

tory contract is of no value whatever, for it affords no protection to the mortgagee; it gives him no right against the mortgaged property which the parties to the contract are compelled to respect.

We pass now to a consideration of another question raised by the Court and that apparently led to the conclusions reached in this case, viz: whether under the doctrine of relation the deeds to the Districts relate back to the date of the original contracts so as to cut off the lien of appellants' mortgage.

THE DEEDS TO THE DISTRICTS CAN NOT RELATE BACK TO THE ORIGINAL CONTRACTS SO AS TO CUT OFF THE LIEN OF APPELLANTS' MORTGAGE.

The crucial point in this case would seem to be the application of the doctrine of relation. It is conceded that a deed takes effect only from delivery, but that in certain cases a deed may relate back to the time of a contract for the purchase of the land conveyed. The trial court held that the case at bar was such a case, notwithstanding the fact that the application of the doctrine destroyed practically all of the security for the intervening mortgage of appellants on which over $35,000.00, with interest for a year and a half was due.

We contend that the Crane Creek Company had a right to mortgage its interest in this irrigation system and these contracts to appellants; that the Districts had at most only an equitable interest in the project prior to the making of the various deeds

purporting to convey them the legal title, and the Districts having paid the Crane Creek Company for the system after notice of appellants' mortgage, did so at their peril; and finally that the doctrine of relation is a mere fiction of law and is never allowed to operate to the prejudice of third persons, and particularly not so as to restrict or destroy the rights of an assignee of the vendor's interest in a contract of sale.

Under an ordinary contract for the sale of realty the equitable title to the property vests in the purchaser when the contract is executed and the legal title remains in the vendor as security for the purchase money unpaid.

39 Cyc. 1301-1303.
1 Pomeroy Equity, Sec. 368, 372.
3 Pomeroy, Sec. 1260.

In 3 Pomeroy, Sec. 1261, the author says:

> "He (the vendor) holds the legal title as security for the performance of the vendee's obligation, and as trustee for the vendee, subject to such performance, and *that title may be conveyed* or devised, and will descend to his heirs."

In Gessner vs. Palmater, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, the Court said: (13 L. R. A., page 188.)

> "Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it

as security. The vendee cannot prejudice that title, or in any way devest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. Stevens vs. Chadwick, 10 Kan. 413. It has been called an 'imperfect' or 'equitable' mortgage, which is a more appropriate term than 'vendors' lien.' Moore vs. Lackey, 53 Miss. 85. In many of the best-considered cases, including Sparks vs. Hess, supra, it is treated as if it had the similitude of a mortgage, subject to foreclosure in the same way a mortgage is foreclosed. There is no necessity for any lien by implication. Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security. Avery vs. Clark, 87 Cal. 619 (filed February 6, 1891); Wright vs. Troutman, 81 Ill. 374; Adams vs. Cowherd, 30 Mo. 460; Lowery vs. Peterson, 75 Ala. 109; Bradley vs. Curtis, 79 Ky. 327; McClintic vs. Wise, 25 Gratt. 448; Lagow vs. Badollet, 1 Blackf. 419; Dingley vs. Bank of Ventura, 57 Cal. 471."

The law on this point is well stated in the brief opinion in Taylor vs. McKinney, 20 Cal. at page 620, which is as follows:

> "This is an action to recover the purchase money of certain real estate, and to enforce a vendor's lien for its payment. It is unnecessary to notice the points raised upon matters of evidence, except to say that there is nothing in them to justify us in disturbing the findings. The case, in other respects, is similar to that of Sparks vs. Hess, (15 Cal. 186) the only difference being that here the contract has been assigned, and it is claimed that the lien of a vendor is not assignable. The vendor not only assigned the contract, but executed to the assignee a conveyance of the property; and there is no doubt that the effect was to vest in the latter all the rights and equities pertaining to the former. The assignee holds the title as security for the payment of the money, and it would be an anomaly in legal proceedings if this security could not be enforced as a lien upon the property."

See also:

39 Cyc. 1664, 1665.

Avery vs. Clark, 87 Cal. 619; 25 Pac. 919.

Lagow vs. Badollet, 1 Blackf. 416, 12 Am. Dec. 258.

Nat. Bank of Com. vs. Lock, 17 Wash. 528, 50 Pac. 478.

If this interest can be conveyed outright it can be mortgaged, for Sec. 3403, Idaho Revised Codes, pro-

vides, "any interest in real property which is capable of being transferred can be mortgaged," and if the interest of the Crane Creek Company is considered more as in the nature of personal estate, the mortgage is clearly sufficient as an assignment of the right of the Crane Creek Company to collect the balance of the purchase price for the system.

In Lamm vs. Armstrong, 95 Minn. 434, 104 N. W. 304, 111 Am. St. Rep. 479, 5 Ann. Cas. 418, the Court held that a subsequent cancellation of a contract for the sale of realty by the vendor did not affect the rights of a party to whom he had assigned such contract as security for a loan. The note on this case in Vol. 5, Am. & Eng. Ann. Cases, contains a valuable collection of the authorities on this point.

The Court said: (Am. St. Rep., page 481.)

> "It is elementary, in cases of executory contracts of this nature, that the vendor continues in a strict legal sense the owner of the land until the purchase price is paid; the vendee holding only the equitable title, the legal title remaining in the vendor as security: Minneapolis etc. Ry. Co., vs. Wilson, 25 Minn. 382; Berryhill vs. Potter, 42 Minn. 279, 44 N. W. 251. With the legal title in the vendor, he would have the clear right to mortgage the property, either by an assignment of the contract of sale or directly by execution of a formal instrument for that purpose. Either of which would, of course, be subject to all the rights of the vendee. It is certain that the parties to this transaction had in mind adequate security for the pay-

ment of the indebtedness to Lamm, and the result of their action must be held to effectuate their intent, to have created the relation of mortgagor and mortgagee between them: 11 Am. & Eng. Ency. of Law, 2d ed., 129, and cases cited. The assignment was, in effect, a transfer to the assignee of the assignor's lien for the purchase price of the land. The fact that Armstrong subsequently canceled the contract by an agreement with the vendee does not affect the rights of Lamm."

At most the interest of the irrigation districts under the contracts of August 22nd, 1910, was merely the right in equity to compel a conveyance of the system upon full payment by them and performance of all their obligations, and we do not think these contracts conveyed an equitable interest in the real estate. The contracts were wholly executory when appellants took their mortgage. Not a dollar had been paid and no work had been done since the contracts had been made. Furthermore, these were not contracts which a court of equity would specifically enforce at that time, because they involved the construction of a large irrigation project which it was estimated would occupy nearly two years. It is well settled that courts of equity will not enforce such contracts.

See:

Texas & Pac. Ry. Co. vs. Marshall, 136 U. S. 393, 34 Law Ed., 385-390.

Farmers' Loan & Trust Co. vs. Burbank P. & W. Co., 196 Fed. 539.

Under these circumstances the Districts did not and could not have an equitable interest in the project until they were in a position to compel specific performance of the obligations of the other party. That is to say, if the Crane Creek Company had constructed the project and refused to convey the Districts after full performance on their part could have compelled a conveyance.

The position of the Districts under this contract is well illustrated by the case of Smith vs. Jones, (Utah), 60 Pac. 1104, where the Court states:

> "Nor was the nature of the contract such as to create an equitable title in the purchasers. Smith could not enforce performance on the part of those with whom he contracted. The consideration of $5,000 was to be paid only out of the mineral to be produced, and the mineral was a thing not in esse, but formed a part of the earth, and the agreement contained no provision by which its production could be compelled, and there was no obligation to convey the land until the consideration was paid. The agreement was but an option to purchase, and gave to the prospective purchasers a right to extract ore. 'A mere contract or covenant to convey at a future time on the purchaser performing certain acts does not create an equitable title. It is but an agreement that may ripen into an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title, and may compel a conveyance. Bisp.

Eq. Sec. 365. When the purchaser is in a position to compel a conveyance by a bill in chancery, he then holds the equitable title. Before that he only has a contract for a title when he performs his part of the agreement'."

To the same effect are:

Bartlesville Oil Co. vs. Hill, 30 Okla. 829, 122 Pac. 208.

Younkman vs. Hillman, 53 Wash., 661, 102 Pac. 773.

But if we assume that the Districts had an equitable interest in the project by virtue of their contracts, nevertheless appellants' mortgage was valid and gave a lien upon the legal title held by the Crane Creek Company as security for the payment of the purchase price, and this lien transferred to appellants' the right to receive such payments until their mortgage was satisfied. Actual knowledge of appellants' right is clearly brought home to both Districts (Trans., page 159 and page 165), and payments made by the Districts to the Crane Creek Company were made at their peril. This is clearly shown by the case of Laughlin vs. North Wisconsin Lbr. Co., 176 Fed. 772, where at page 777 the Court states:

"Every purchaser of land by executory contract knows that the vendor has the *jus disponendi*. The land is not made inalienable merely by contracting to sell it. In case of a transfer the vendor has no right to receive the money if the

vendee knows of the conveyance. If he pays the vendor, he may have to pay again."

This decision is affirmed by the Circuit Court of Appeals in 193 Federal, page 367.

In Southern Bldg. Assn. vs. Page, 46 W. Vir. 302, 33 S. E. 336, one Page gave a title bond to Miller for a half interest in a piece of property and later gave a trust deed of all his property to plaintiff as security for a $5,000.00 loan. Both the bond and the deed were recorded. Miller claimed to have paid Page and Page had given him a deed after the date of the mortgage. It was held that Miller could not pay Page except at his own risk and peril, but should have paid the plaintiff; that it was a fraud for Page to receive the money and Miller could not take advantage of such fraud, and finally that Page's subsequent deed was of no effect until the trust deed was released.

In Mutual Aid etc. Co. vs. Gashe, 56 Ohio St. 273, 46 N. E. 985, one Ransom made a contract of sale to the Ohio Company which went into possession and began construction of a manufacturing plant. After rights to mechanics' liens had been initiated by such work Ransom deeded the property to Paine and Paine mortgaged it to the plaintiff. Shortly after the mortgage he gave the Ohio Company a deed. The contest was between the lien claimants and the mortgagee, and the Court held that the mortgagee had priority over them to the extent that the purchase price was unpaid at the date of the mortgage. The

following passage from the Court's opinion gives an accurate statement of the law:

> 'The right of one who enters into a contract to convey land, but retains the legal title, and is not bound to convey it to the purchaser until full payment has been made, stands upon a different and more substantial foundation than one who has conveyed his land away. Whatever the rights of the latter may be, and howsoever easily lost, the former has reserved to himself the title, and can be divested of it only by a full compliance with the terms of the contract. This legal title he can convey to another, subject, however, to the rights of the prior vendee; but the rights of the prior vendee against the new owner of the legal title are no greater than they were against his vendor. It is within the power of the original vendor to convey to any purchaser the legal title, and such purchaser will stand in the shoes of his grantor. In the case under consideration, Ransom, the vendor of the Ohio Lumber & Manufacturing Company, conveyed the legal title to Bartram L. Paine. By this conveyance Paine became vested with every right that Ransom had previously possessed. While the legal title was in Paine he conveyed it by way of mortgage to the plaintiff in error, the Mutual Aid Building & Loan Company, to secure a loan of about $5,000. This Paine had a perfect right to do, and by this mortgage he conveyed to the Mutual Aid Building & Loan Company every right possessed by

him, which as we have seen, was precisely those that the original vendor, Ranson, had under his contract of sale; and that was that the balance of the purchase price should be paid before the vendee, the Ohio Lumber & Manufacturing Company, was entitled to receive an absolute conveyance for the lots. The rights of the mortgagee, the loan association, having become fixed by the execution to it of the mortgage, it had no further concern about the actions of Paine, its mortgagor. His subsequent action could not impair its rights. *His deed conveying these seven lots to the Ohio Lumber & Manufacturing Company, executed and delivered after the mortgage lien had attached, did not impair that lien.* True, it placed the legal title in the grantee, but the 'interest' of the grantee was not thereby enlarged. Its obligation to pay the purchase price before the ownership became complete still remained. This obligation has assumed a new form. Instead of being embodied in a contract for the sale and purchase of the lots in question, it was evidenced by the mortgage thereon. Nevertheless, it was in fact the same. Houck, Liens, Sec. 145. Courts of equity, in reaching their conclusions, regard the substance of things, rather than their mere forms."

In some of the cases on this subject we find that the purchase money, notes and other evidences of indebtedness have been transferred to one person and the legal title in the property conveyed to another. That was the case in Georgia State Assn.

vs. Faison, 114 Ga., 655, 40 S. E. 760, where it was held that the transfer of the notes carried the lien. The Court said:

> "The purchaser of the vendor's interest is entitled to call for the balance of the purchase money as the representative of the vendor."

In the present case the entire interest of the Crane Creek Company, including the contracts with the Districts were transferred, and the Districts had full knowledge of the transfer so there can be no question but that they paid the Crane Creek Company at their peril.

In the case of Ten Eick vs. Simpson, 1 Sandf. Chanc. (N. Y). 244 it was held that under similar circumstances the vendee must pay the vendor's assignee in order to get a clear title, although he had already paid the vendor. Other cases in support of the above rule are:

Elliott vs. Delaney, 217 Mo. 14, 116 S. W. 494.

Tait vs. Reid, (Iowa) 139 N. W. 1101.

Minaker vs. Sunset Etc. Assn., Cal. App. 145 Pac. 542.

Fargo vs. Wade (Ore.) 142 Pac. 830.

Wright vs. Troutman, 81 Ill. 374.

Lowery vs. Peterson, 75 Ala. 109.

Adams vs. Cowherd, 30 Mo. 458.

Russell vs. Kirkbride, 62 Tex. 455.

McClintic vs. Wise's Administrators, 25 Gratt. 448.

It follows necessarily from the above authorities that the Crane Creek Company had deprived itself by the mortgage to appellants of the power to convey the legal title to any part of this system, otherwise than subject to appellants' mortgage. Nor can the fiction of relation be relied upon to release the irrigation system from appellants' mortgage, because that fiction is only applied as between the parties, and in the interest of justice and not in order to work an injustice to third parties.

The rule is laid down clearly in 1 Devlin on Real Estate, Sec. 264, as follows:

> "A deed takes effect only from the date of its delivery, which may be either actual or constructive. Between the same parties a deed may sometimes, for the furtherance of justice, be permitted in its operation to relate back to the time of the contract for the purchase of the land to be conveyed by the deed; but this effect will not be given to it when wrong would thereby be done to strangers."

This rule has been recognized since the time of Lord Coke when it was announced and followed in the case of Butler & Baker, 3 Coke Reports, 25, 29b.

In Jackson vs. Davenport, 20 Johns. (N. Y.) 536, at page 550, in refusing to allow a deed executed under a power to relate back, the Court states:

> "The doctrine, that a deed executing a power refers back to the instrument creating the power, so that the party is deemed to take under the

deed from the grantor by whom the power was created, and not from the power, is a fiction of law, and so it was considered in *Bartlett vs. Ramsden*, (1 *Keb.* 570) *relatio est fictio juris* according to the resolution in Menvil's case, (13 Co.) and is upheld to advance a right, not to advance a wrong, or to defeat collateral acts which are lawful, and especially if they concern strangers. The limitation of the fiction, so as to prevent it from doing injury to strangers, or defeating mesne lawful acts, is the common language of the books." (Citing cases.)

In Murphree vs. Countiss, 58 Miss. 712, 717, N. made a contract of sale with Murphree. Later, Countiss agreed to pay N, who was to make a deed to Murphree, and the latter agreed to execute a mortgage to Countiss. After he had received the deed Murphree refused to make the mortgage and the Court held Countiss was entitled to a lien on the land, and this lien was not defeated by the deed to Murphree. The Court says:

"Between the time of the execution of the note to Countiss and the reception of the deed by Murphree, the latter held the land under a title bond, which by agreement of all parties had been made payable to Countiss, the assignee of the vendor. Such a lien being assignable will not be defeated by the subsequent reception of the deed, so long as the land remains in the hands of the vendee or his grantees with notice."

The case last cited seems squarely in point, as does also that of Jackson vs. Bard, 4 Johns. 230, 4 Am. Dec. 267. The facts as far as they involve this question were as follows: Smith contracted to buy land from Dickenson in the summer of 1798 and Dickenson mortgaged the same land to Barton, March 8th, 1799. Under this mortgage the land was eventually sold on foreclosure to plaintiffs. Smith obtained a deed from Dickenson March 11th, 1799, and claimed that his title under this deed related back to the date of the contract. The Court refused to apply the doctrine of relation, saying at page 269 of 4 Am. Dec.:

> "The deed from Dickenson to Smith cannot, in its operation, relate back to the time the contract between them was made, so as to bring it within the scope of the decision in the case of Jackson vs. Raymond, 1 Johns. 85, note. It is a general rule, with respect to the doctrine of relation, that it shall not do wrong to strangers; as between the same parties it may be adopted for the advancement of justice: 3 Caines, 263. Barton was a stranger to the contract between Dickenson and Smith, and *it would be the extreme of injustice to permit his mortgage to be defeated, by considering Smith's deed to take effect by relation from the time he made his contract for the purchase of the premises.*"

In Barnes vs. Cox, Neb. 79, N. W. 550, the Court says:

> "The doctrine of relation can not be given effect to the prejudice of third parties who acquir-

ed rights in the property before the actual delivery of the conveyance."

The same Court in Rogers vs. Heads Iron Foundry, 70 N. W. 527, sustained the above rule, citing and commenting upon a great many of the cases involving this question. Other cases to the same effect are:

Eirich vs. Leitschuh, 81 Ill. App. 573.
Pratt vs. Potter, 21 Barb. (N. Y.) 589.
Fite vs. Doe, 1 Blackf. (Ind.) 127.

The same rule is frequently applied where creditors of a vendee levy execution upon his interest before he has received full payment or delivered a deed. In such cases the creditor is entitled only to a lien for the balance of the purchase money due at the date of the levy. It is said in 39 Cyc. page 1557:

"According to the prevailing rule, a judgment recovered against a vendor after the making of the contract * * * and before execution and delivery of a deed is a lien on the legal title and binds the land to the extent of the unpaid purchase money."

And then numerous State decisions sustaining this view are cited. Then the author further states:

"But it does not displace or otherwise impair the right of the purchaser under his contract."

If a judgment can thus become a lien on the vendor's interests, why not a mortgage?

In Tomlinson vs. Blackburn, 37 N. C. 509, it is held:

"Land under contract of sale, but before a conveyance or the payment of the purchase money, was taken on execution against the vendor. Held, that the purchaser under the contract could not be relieved against a purchaser under the execution with notice of the prior contract, except upon paying to such purchaser the price paid by him, or the price under the said contract."

In O'Neil vs. Wabash Ave. Church, 4 Biss. 482, Federal Case 10,531, one Bronson made a contract for the sale of land to O'Neil, payments to be made in installments, and the contract was recorded. Later the land was levied upon under a judgment against Bronson and sold, and a Sheriff's deed given therefor. Still later Bronson gave O'Neil a deed to the property and the controversy was between him and the execution purchaser or his grantee. The Court held that title could not relate back to the date of the contract so as to cut off intervening rights. The Court stated:

"It seems to me that, under such circumstances, where a contract of sale is made, and only a small part of the purchase money paid, and a judgment is afterwards obtained against the owner of the land that judgment binds his interest, whatever it may be, and it is subject to sale under that judgment. It is a doctrine attended with very serious consequences, to hold that, under such circumstances, when a deed is made by a vendor to a vendee, it relates back so as to cut off all equities which may have inter-

vened, and of which it may be the whole world would be obliged to take notice."

In May vs. Emerson, 52 Ore. 262, 96 Pac. 454, at page 455, the Court says:

"It is beyond controversy that the title remains in the vendor until the actual delivery of the deed. The vendor still has not only the legal title, but also an interest in the property as security for the payment of the purchase price; and this interest should be and is available to a creditor through the lien of his judgment, which lays hold of such legal title, and thereafter payments made to the vendor to the vendee are at his peril."

The opinion of the trial court lays emphasis upon the fact that the contract between the Crane Creek Company and the Districts calls for a conveyance to the latter free from encumbrances, but this does not enable these parties to eliminate appellants' mortgage by the mere artifice of a conveyance. Appellants' mortgage of which the Districts had both constructive and actual notice contains the following provisions: (Trans. pages 37 and 38).

"1. The mortgagor shall have the right to carry out its contract with what is known as the Sunnyside Irrigation District, which contract bears date of August 22nd, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Sunny-

side Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as trustee, Seventy-five Thousand Dollars, ($75,000.00) par value of the legally issued bonds of said irrigation district, the legality of which said bonds shall first have been approved by the Supreme Court of the State of Idaho. But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Sunnyside Irrigation District.

"2. The mortgagor shall likewise have the right to carry out its contract with what is known as the Crane Creek Irrigation District, which contract bears date of August 22nd, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Crane Creek Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as Trustee, Fifty Thousand Dollars ($50,000.00) par value, of the legally issued bonds of said irrigation district the legality of which said bonds shall have first been approved by the Supreme Court of the State of

> Idaho. But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Crane Creek Irrigation District."

Under these circumstances if the Districts wished the property released from this mortgage, they should have seen that District bonds in the requisite amounts were deposited with the trustee, and then and not till then, would they have been entitled to a release of the mortgage. Instead of doing this, they disregarded the mortgage entirely, turned over their bonds to the Crane Creek Company and agreed that the latter might sell the bonds at 60 cents on the dollar and apply the proceeds to discharge the claims of the contractors and material men working on the project, all of whom, as we have shown above, were subsequent encumbrancers, to appellants, in fact only a few of them had any lien on the project. Having thus played fast and loose with appellants' mortgage and having totally disregarded their equities, these Districts should not now be permitted to save themselves by invoking the fiction of relation and thus destroy appellants' security.

In connection with the doctrine of relation, we desire to call the attention of the Court to the fact that it was not the contract of August 22, 1910, that was finally consummated and under which the Crane Creek Company deeded or conveyed undivided interests in this project to the Districts. That contract was modified and changed in numerous particulars

after appellants' mortgage was executed and recorded. Among other things, the interest to be conveyed to the Sunnyside District was increased from 35.26% to 47.2%, and numerous other changes were made that relieved the Crane Creek Company of penalties and made it possible for the Districts to take advantage of their bargain, all without the consent of the mortgagees.

It may well be assumed that the inability of the Districts to carry out the contract of August 22, 1910, according to its terms, was taken into consideration by the mortgagees in extending credit to the Crane Creek Company and taking the project as security. The subsequent contracts show clearly that the changes made were necessary, both from the standpoint of the Districts and the standpoint of the Company; and that if they had not been made the entire project would have been subject to appellants' mortgage and no part of it would ever have been conveyed to the Districts under the contract of August 22, 1910, for that contract could not be carried out by either of the parties to it.

All of the subsequent contracts, including the change in percentage to be conveyed to the Sunnyside District, were totally ignored by the court below, and the doctrine of relation based on the contract of August 22, 1910, applied to all subsequent contracts and changes. We respectfully submit that if the doctrine of relation is applied at all, it can only relate back to the date of the last change or modification of the contract.

An examination of the various contracts entered into by the Crane Creek Company and the Districts and the course of dealing pursued and finally culminating in the deeds from the Crane Creek Company to the Districts, and the payment therefor by the Districts, disclose what we believe to be a flagrant violation of the law of the State governing irrigation districts to an extent that would seem to render the contracts void; and the doctrine of relation can in no event rest on such illegal contracts and wrongful acts, and no rights thereunder can be claimed by any of the parties to the contract so as to prejudice the right of the mortgagees who had a valid, existing mortgage on the project before the pretended conveyances were made by the Crane Creek Company to the Districts. We pass now to a consideration of that question.

The payments from the Irrigation Districts to the Crane Creek Company were made contrary to law, and no rights can be claimed thereunder.

The appellees, Sunnyside Irrigation District and Crane Creek Irrigation District, as appears from the pleadings and record in the case, were organized under the irrigation district laws of the State of Idaho, which are substantially the same as the so-called "Wright Act" of California. Bonds may be issued for two purposes, and only two.

Section 2396 of the Idaho Revised Codes, insofar as it relates to the question under consideration, provides as follows:

"As soon as practicable after the organization of any such district the board of directors shall, by a resolution entered on its records, formulate a general plan of its proposed operations, in which it shall state what constructed works or other property it proposes to purchase and the cost of purchasing the same; and further what construction work it proposes to do and how it proposes to raise the funds for carrying out said plan. * * * * "

This section of the Idaho Code was adopted from the California Statutes in 1903.

Section 2386 of the Idaho Revised Codes, insofar as it relates to this subject, provides that "in case of purchase (of works or property) the bonds of the District hereinafter provided for may be used to their par value in payment."

And Section 2404 of the Idaho Code relative to the sale or disposal of irrigation district bonds provides:

"The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to carry out the object and purposes of this title. Before making any sale the board shall, by resolution, declare its intention to sell the specified amount of the bonds, and if said bonds can then be sold at their face value and accrued interest,

they may be sold without advertisement, otherwise said resolution shall state the day and hour and place of such sale, and shall cause such resolutions to be entered on the minutes, and notice of sale to be given by publication thereof at least four weeks. * * *. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or may reject all bids * * * provided, said board shall in no event sell any of the said bonds for less than the par or face value thereof and accrued interest."

There are but two ways of disposing of irrigation district bonds. One is to use them at par in payment for property purchased, and the other is to sell them at par and accrued interest after due notice to the public. They cannot be used in payment to contractors for construction work, based on engineers' estimates. In such cases it is a well-known fact that contractors do the work at exorbitant prices and thereby evade the law that the bonds must be sold at par by the Districts. The Legislature has carefully provided that the bonds shall either be sold at par and the proceeds used for the purchase of material and the payment of contractors for the construction of works, or, if property be purchased, the District may use bonds at par in payment for the property.

Long before these statutes were adopted in the State of Idaho they had been construed by the Supreme Court of California, particularly in the case

of Hughson v. Crane, 115 Calif., 404, 47 Pac. 120. After quoting the California statutes, which are identical with the Idaho statutes on this subject, the Court said:

> "These are the only provisions in the act for any disposition by the directors of the bonds of the district; and it follows that the only mode in which they can exercise their power of disposing of the bonds so that they may become valid obligations against the district is either to exchange them for property at their par value or to sell them for money in open market under the restrictions and limitations given in Section 16 at not less than ninety per cent. of their face value. The express provisions giving to the board power to exchange them for certain property at their par value excludes the right of the board to exchange them for any other purpose or to dispose of them in any other manner than by the sale authorized by Section 16."

Later the same Court, in Leeman v. Perris Irrigation District, 140 Calif. 540, 74 Pac. 24, said:

> "There is no express authority anywhere in the act for exchanging bonds for construction work, or for exchanging bonds for warrants issued for construction work drawn upon the construction fund * * *. The board of directors has only such powers as are expressly given or as implied to carry out the main purpose of the act. * * * The authority to dispose of bonds being by express terms limited to two

modes, excludes all others by plain implications. It can not be reasonably said that the power to exchange bonds for warrants issued for construction work is necessarily implied from the express power to exchange bonds in payment for property. And while it is true that the proceeds of bonds sold constitute a construction fund on which warrants for construction work may be drawn, still there is no authority for exchanging bonds for construction work, and there can be no implied authority to exchange bonds for warrants issued for such work. The act directs that in exchanging bonds for property they must bring par, while in selling them in open market —the only remaining mode expressly given—they may be sold for ninety per cent. of their face value."

It should be noted that the California law permits the district to sell the bonds at ninety per cent. of their par value, while the Idaho law requires that they be sold at par. In the case last cited, the Court further said:

"The evident intention of the act is that bonds must be sold (except in the single instance of exchange for property) to the highest bidder in open market for cash, and that construction work must be done on the best terms for cash. One who purchases bonds knowing that they were negotiated in a manner not authorized by law, is not a bona fide purchaser but becomes then subject to any defense existing against them."

It would seem that the contract of August 22, 1910, was intended as a contract of purchase so as to come within the rule announced by the Supreme Court of California, in Stowell v. Rialto Irrigation District, 155 Cal. 215; 100 Pac. 248. But the subsequent contracts between the parties and the course of dealing as it was actually carried out, show such a departure from the rule announced in the case last cited that it does not seem that it can be held that the laws of Idaho approve or permit public and quasi-municipal corporations to transact business and acquire property and incur indebtedness in this manner. The testimony of Mr. Coulter (Trans., pp. 160-165) shows how bonds were delivered upon engineers' estimates from time to time as the work progressed, and how the bonds were permitted to be sold at sixty cents on the dollar, while they were still the property of the Districts and long before the Crane Creek Company was entitled to the bonds, and how the proceeds from the sales were placed in trust for the Districts to be eventually paid out to the Crane Creek Company, upon engineers' estimates, for construction. (See contracts of October 16, and November 21, 1913, covering this matter. Trans., pp. 136-150.)

We submit, therefore, that the mortgagees cannot be deprived of their security by the illegal and unauthorized acts of the Irrigation Districts and the Crane Creek Company. It would seem that the bonds which the Districts claimed to have delivered are not legal or valid obligations of the Districts, but that upon a proper proceeding those bonds will be

cancelled and annulled and held invalid; and the mortgagees should not therefore be deprived of their security and the property released from the lien of the mortgage because of pretended payments in bonds that must afterwards be held illegal and void.

We now pass to a consideration of the resolutions and certificates passed or issued by the Districts recognizing the validity of appellants' mortgage.

THE DISTRICTS ARE ESTOPPED TO DENY THE VALIDITY OF THE LIEN OF APPELLANTS' MORTGAGE ON THEIR INTERESTS IN THE SYSTEM.

Even if it be assumed that the interests of the irrigation districts in this project for any reason are not subject to the lien of appellants, they are estopped on the simplest principles of honesty and fair dealing to set up such a defense.

Maney Brothers Exhibits 5 and 6 are respectively a certificate signed by the Presidents of both Districts and a resolution by the Board of Directors of the Crane Creek District ratifying and confirming such certificate, both of which concede the validity of the lien of appellants' mortgage against the Districts' interests and disclaim any priority by reason of conveyances that have been made or may be made from the Crane Creek Company to the Districts. The Sunnyside District passed a resolution identical with Exhibit 6.

The evidence as to these certificates and resolutions was as follows: Mr. Ford, President of the Crane Creek Company, said:

"I advised the Districts of the giving to Maney Bros. of that mortgage on the system about the time it was given. During the spring and summer of 1913, and frequently thereafter, I had conferences with Maney Bros. about the taking up of their mortgage. They were pressing for payment most of that time. They were going to foreclose during the spring, or the early spring of 1914, and I took those matters up with the district with the view of getting certain statements from the districts recognizing Maney Bros. mortgage. Maney Bros. Exhibit No. 6 is a resolution that I prevailed upon the districts to execute in order to get certain concessions from Maney Bros."

Mr. Coulter, who was Secretary of the Sunnyside Irrigation District and attorney for both Districts (Trans., p. 151), said, at page 154: "I prepared paper marked 'Maney Bros. Exhibit No. 5.' The signatures attached are the genuine signatures of the Presidents of the two Districts." Then, referring to Exhibit No. 6, he says, at page 156: "These resolutions were in duplicate. These were passed by both Districts, identical in form, and they were afterwards transmitted by me directly to Maney Bros."

The certificate, Exhibit 5, Trans., pages 154 to 156, was dated June 15th, 1914, and signed Crane Creek Irrigation District by Chas. C. Cleary, President, Sunnyside Irrigation District, by O. M. Harvey, President, and sealed with the seals of both Districts. It certifies that the Districts entered into

contracts with the Crane Creek Company for the purchase of interests in this irrigation system when constructed, to be paid for in bonds of the Districts, which contracts provided that such interests, when completed, were to be conveyed "free from all liens and claims of every description," that the system has not been completed or final conveyance made, and that there is a mortgage upon the property in favor of appellants. It then continues as follows:

> "And it is conceded that said mortgage is a valid and subsisting lien against said lands as against the Crane Creek Irrigation Land and Power Company and said irrigation districts, and that so far as said Maney Brothers & Co. are concerned, and the said mortgage, the said Crane Creek and Sunnyside Irrigation Districts have no defense against the same, and the conveyances that have been made to said reservoir, and the conveyances that may be made by the Crane Creek Irrigation Land and Power Company to them of the interest in said reservoir, and all conveyances which may be made prior to the satisfaction of said mortgage, will be subject to the lien of said mortgage."

Exhibit No. 6 is a certified copy of the resolution of the Board of Directors of the Crane Creek District passed at the meeting held August 18th, 1914, and is as follows:

> "*Be It Resolved*, By the Board of Directors of the Crane Creek Irrigation District, that the act

of the President of this District in executing and delivering to Maney Bros. & Company in the name and for and on behalf of this District, the following certificate or agreement:

(Setting out Exhibit No. 5 in full.)

be and the same is hereby ratified, approved and confirmed." (Trans., pp. 157-9.)

It is clear from the above evidence that the giving of this certificate and these resolutions prevented foreclosure proceedings by appellants at that time, and in fact no foreclosure was attempted until after defendants had been made a party to the suit brought by the Portland Wood Pipe Company, and their cross-bill was filed herein on the 29th day of December, 1914. This delay in bringing foreclosure proceedings enabled the Districts to get the project completed and final conveyances made to themselves, and additional bond deliveries were made to the Crane Creek Company and the settlement referred to in the Court's opinion (Trans., p. 183) was reached with Slick Bros. Construction Company, the principal contractor on the system, under which bonds and other securities were placed in the hands of trustees by the Crane Creek Company. Based upon this settlement the trial court denied such principal contractor a mechanic's lien on the system, which was clearly a great benefit to appellees. During all this time appellants, relying upon this certificate and these resolutions as admissions that their lien was valid and binding against the Districts, stood back and gave the Districts and the Company an oppor-

tunity to work out their financial difficulties, and now by reason of this leniency on their part the Districts are attempting to penalize them.

The obvious expectation of the Districts in giving the certificate and resolutions was to gain time and to avoid the impending foreclosure; in short, to lull appellants into a sense of security. Whether at that time the Districts intended to live up to their recognition of the lien of appellants or whether at the very time they were making these representations they expected to contest any foreclosure suit which appellants might bring eventually, the record does not show. In either event there would be a flagrant violation of the principles of fair dealing and common honesty. In either case the Districts should be estopped to claim that the conveyances from the Crane Creek Company defeated the lien of appellants or to deny the validity of such lien against their interests for any reason. The trial Court said there were wanting in this case some of the elements of estoppel, but did not specify such elements, and apparently the Court was referring to the fact that these representations were not in regard to existing facts, but rather as to matters of intention or opinion. In certain cases, however, estoppels are raised on such a state of facts.

In 2 Pomeroy, Eq. Jurisprudence, Sec. 877, note, it is said:

> "It must not be understood that no rights would flow from such a statement. A representation of a future intention, absolute in form, de-

liberately made for the purpose of influencing the conduct of the other party, and then acted upon by him, is generally the source of a right, and may amount to a contract, enforceable as such by a court of equity." (Citing numerous cases.)

In the leading case of Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618, a party wrote that he would not claim certain property, and this was held to estop him and his grantee from claiming the property in an action of ejectment. The Court said, at page 619:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

At page 620 the Court quotes the following, with approval from a Michigan case:

> "There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in

such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect."

The above authorities were followed in the well-considered case of Seymour vs. Oelrichs, 156 Cal. 782, 106 Pac. 88, in which the authorities are fully reviewed. See also Faxton v. Faxton, 28 Mich. 159. This sort of estoppel is closely akin to a waiver and the rule is stated with even greater clearness in the case of Union, etc., Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674, as follows:

"The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others; and by which they have been induced to act. * * * *

"The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if the party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment."

The rule has been adopted in numerous cases, among which are:

Banning v. Kreiter, 153 Cal. 33, 94 Pac. 246.
American Sur. Co. v. Ballman, 52 C. C. A. 204, 115 Fed. 292.
Edison Elec. Light Co. v. Buckeye Elec. Co., 59 Fed. 691.

It is perfectly clear that appellants acted upon these representations to their prejudice, and that the Districts secured a substantial benefit by making them. If this estoppel were urged against a private individual or a private corporation, it would undoubtedly prevail, and we submit that the fact that appellees are *quasi* public corporations can make no difference. Pleas of estoppel are sustained every day against cities, counties and states, and irrigation districts have no peculiar right to indulge in unfair dealings. The boards of these two districts had power to contract for the irrigation system, and did so contract. They could have purchased a system free from liens or subject to liens. Appellants' lien was on the property before they acquired it, and the only question was whether they were going to take subject to such lien or free from it. Appellants were entitled to assume that the Districts would hold back enough of the purchase price to protect themselves against the failure of the Crane Creek Company to pay off this lien, and appellants should not be made to suffer because the Districts did not do this.

The Supreme Court of Idaho in Boise City vs. Wilkinson, 16 Idaho, 150 to 178, 102 Pac. 148, in upholding a plea of estoppel against the City, said:

> "Courts of equity are established for the administration of justice in those peculiar cases where substantial justice cannot be administered under the express rules of law, and to adopt a rigid rule that recognizes no exceptions would be to rob such courts of much of their efficacy and power for administering even-handed justice. The people in their collective and sovereign capacity ought to observe the same rules and standard of honesty and fair dealing that is expected of a private citizen. In their collective and governmental capacity, they should no more be allowed to lull the citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen."

The same rule was adhered to in Portland vs. Inman-Poulson Lbr. Co. (Ore.), 133 Pac. 829, 46 L. R. A. (N. S.) 1211, where the representation was that the city would never claim the right to open certain streets. In that case the court said:

> "There is not one rule of morals for a municipality and another for an individual."

Other cases upholding estoppels against public corporations under circumstances similar to the present are:

> Board etc. of Arapahoe County vs. Denver, 30 Colo. 13, 69 Pac. 586.

Hubbell vs. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52.
State of Indiana vs. Milk, 11 Fed. 389.

We accordingly submit that even if the Districts ever had a right to contest the validity of appellants' mortgage as against their interests in this system, they effectively estopped themselves from so doing by the certificate of June 15, 1914, which was subsequently ratified by their Boards of Directors in regular meeting.

ATTORNEYS' FEES.

The trial court awarded appellants $1,000.00 attorneys' fees for foreclosing a mortgage aggregating $40,150.00 and covering property involved in complicated descriptions and affected by numerous liens and claims. The circumstances surrounding the foreclosure were of such a character that the greatest care was required in order to ascertain the parties interested in the property, either as owners, lien claimants, or otherwise, and the nature and extent of their respective interests. The fees allowed were a little less than two and one-half per cent. (2½%) of the amount due under the mortgage. The parties to the suit were numerous and service had to be obtained on many of them out of the State through the issuance and service of warning orders.

The mortgagees in their bill ask for an allowance of $4,000.00 for attorneys' fees on this account. The only evidence in the case is that of ex-Governor

James H. Hawley, a distinguished member of the Idaho Bar for upwards of forty years. Governor Hawley testified that, in his opinion, $2,500.00 would be a very reasonable fee. (Trans. pp. 172-179).

Apparently the only reason why the learned trial Judge disregarded the evidence and fixed the amount at $1,000.00 was the fact that he concluded appellants were not entitled to a mortgage upon the interests in the system conveyed to the Districts, and the further fact that counsel for appellants also represented other parties to the suit. The latter we respectfully submit should not be considered. That is not an element that should operate to the advantage of the defendants in the foreclosure, and it is by no means to be presumed, in the absence of evidence, that appellants got a "cut rate" because their counsel also appeared for other parties. The sole question in fixing attorneys' fees should be the reasonable value of the services rendered in view of the labor performed by and required of counsel in the case.

The controlling question with the court apparently was that appellants did not succeed in obtaining a lien upon the interests of the Districts. As to that, we respectfully submit that counsel for appellants would have been derelict in their duties had they not made the Districts parties defendant and sought to impress the mortgage lien upon the entire irrigation system. The questions involved cannot be said to be so clear and simple that counsel should have

proceeded with the foreclosure only against the Crane Creek Company and the endorsers on the note. It may be inferred from the court's decision that appellants had a lien upon the Districts' interests in the system to the extent that the same had not been paid for, and in view of the complicated situation as to the time and manner of payment we know of no way that the facts as to such matters could have been ascertained or determined except by a suit to which the Districts would be parties.

We submit, therefore, that the trial court was not justified under the facts in this case in allowing mortgagees only $1,000.00 attorneys' fees for foreclosing a mortgage aggregating over $40,000.00. Furthermore, should our contentions be sustained as to the interests of the Districts being still subject to the lien of the mortgage, then, manifestly, under the opinion of the lower court appellants should be entitled to a further allowance, which should not be less than $2,500.00 including the $1,000.00 allowed. We submit that the allowance of $1,000.00 is unreasonable and without precedent.

In this connection we again call attention to the fact that the Districts claimed exemption from the mortgage as to their interests upon a ground entirely different from that upon which the court based the exemption. The contention of the Districts, as heretofore stated, was that the irrigation system was by virtue of the contract of August 22, 1910, dedicated to a public use, and that after such

contract had been entered into no mortgage, lien or encumbrance could be imposed upon such system. That contention was totally rejected by the court. Appellees did not claim release of the mortgage as to their interests because they had paid part of the purchase price, or upon the theory of the Court's decision.

Cross-appeal of Sunnyside Irrigation District and Crane Creek Irrigation District.

The two Irrigation Districts have taken a cross-appeal from that portion of the decree giving appellants a lien upon the interest in the system retained by the Crane Creek Company. Manifestly the Districts do not have an appealable interest in that part of the decree, and the taking of the cross-appeal was clearly frivolous and the cross-appeal should be dismissed and the cross-appellants required to pay a reasonable penalty for consuming the time of court and counsel with matters relating to such cross-appeal, and for encumbering the records with the documents relative thereto. In any event the cross-appellants should be required to pay at least a part of the expense of printing the record on appeal.

WHEREFORE, appellants respectfully submit that the decree of the District Court should be modified to the extent of giving appellants a first and prior lien upon all of the irrigation system, water rights, and rights of way described or referred to in their said mortgage, and by increasing the allow-

ance of attorneys' fees from $1,000.00 to not less than $2,500.00, and for other appropriate relief.

Respectfully submitted,

RICHARDS & HAGA, and
McKEEN F. MORROW,
Solicitors for Appellants,
Maney Brothers & Co.,
Residence, Boise, Idaho.

No. 2644

United States
Circuit Court of Appeals
For the Ninth Circuit

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. MANEY, JOHN MANEY, HERBERT G. WELLS and E. J. WELLS),
Appellants,

VS.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, Limited, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD and R. C. McKINNEY,
Appellees,

CRANE CREEK IRRIGATION DISTRICT and SUNNYSIDE IRRIGATION DISTRICT,
Cross-Appellants,

VS.

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. MANEY, JOHN MANEY, HERBERT G. WELLS and E. J. WELLS),
Cross-Appellees.

BRIEF OF APPELLEE.
PORTLAND WOOD PIPE COMPANY.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

WILBUR, SPENCER & BECKETT,
Solicitors for Appellee,
Portland Wood Pipe Co.
Residence, Portland, Oregon.

Gotshall Printing Co., 227½ Stark St.

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BRIEF OF APPELLEE.
PORTLAND WOOD PIPE COMPANY.

STATEMENT OF THE CASE.

There have been a number of statements made in this case by other parties to the record, and for the purpose of raising the single question we desire to call

your attention to in this brief, it will not be necessary to make an extended statement.

The Honorable Frank S. Dietrich, District Judge, who tried this case, held that the Mechanic's lien in favor of the PORTLAND WOOD PIPE COMPANY upon some of the property involved was superior to the lien attempted to be created by the mortgage of Maney Brothers & Co.

Whether or not the Judge was correct in his holding is the only question we care to discuss in this brief.

The contract between the Crane Creek Irrigation Land & Power Co. and the Sunnyside Irrigation District, and the contract between the Crane Creek Irrigation Land & Power Co. and the Crane Creek Irrigation District were both signed on the 22nd day of August, 1910, and they were identical in all of their material provisions.

The only difference in these two contracts arises on account of one Irrigation District embracing more land than the other. Both of these contracts provided for conveyances from time to time by the Crane Creek Irrigation Land & Power Co. to the Districts for completed work as work progressed, and both these contracts provided that the Crane Creek Irrigation Land & Power Co. would convey to these two districts said completed work free from all encumbrances.

The contract between Maney Brothers & Co. and the Crane Creek Irrigation Land & Power Co., which provided for the construction of a reservoir was dated

September 29th, 1911, a little more than a year after the above mentioned contracts between the Crane Creek Irrigation Land & Power Co. and the two Irrigation Districts.

The mortgage of Maney Brothers & Co. was provided for in said contract, and the note and mortgage in favor of Maney Brothers & Co. was also executed on the 29th day of September, 1911.

POINTS AND AUTHORITIES.

Upon the record of this case as presented to this Court, the trial Court properly held that the Mechanic's Lien of the Portland Wood Pipe Co. was superior to the lien created by the mortgage of Maney Brothers & Co.

Creer and others vs. Cache Valley Canal Co., 4 Idaho 280, 38 Pac. 653.

Gardner et al. vs. Leck et al., 54 N.W. 746.

Oriental Hotel Co. et al. vs. John Griffiths, 30 L. R. A. 765.

Davis vs. Bilsland, 18 Wallace 659.

Holt vs. Henley, 232 U. S. 637.

Garland vs. Bear Lake & River Water Works & Irrigation Co., 9 Utah 350.

ARGUMENT.

Upon pages 184 to 185 of the Transcript of Record in this case will be found memorandum decision on claim of plaintiff for lien and Maney Brothers' mortgage, and the same is as follows:

The suit was commenced by the Portland Wood Pipe Company, as plaintiff, to foreclose a mechanic's lien for material furnished to the defendant Slick Brothers Construction Company, for the construction of an irrigation system in Washington County, Idaho, against Slick Brothers Construction Company, a corporation, the Crane Creek Irrigation Land & Power Company, a corporation, Maney Brothers & Company, a corporation, and others, including the Crane Creek Irrigation District and Sunnyside Irrigation District, irrigation districts organized under the laws of Idaho, as defendants. Briefly stated, the facts out of which the controversy has grown are, that, in August, 1910, the defendant Crane Creek Irrigation Land & Power Company, reciting that it was the owner of certain water rights, a reservoir site, and rights of way for canals upon which certain construction work had been done, entered into separate contracts with the two defendant irrigation districts, under the terms of which it was to complete the construction of the reservoir and canals as called for by plans and specifications attached, and, with certain reservations, to make conveyance thereof in undivided interests to the two irrigation districts severally, for the permanent ownership and use by them for the irrigation of the lands which they embrace. In payment for the system when and as the same should be completed the districts agreed to turn over to the Power Company their several coupon bonds at their face value to the amount of the specified purchase price. In some of their features the contracts are unusual, and are probably to be accounted for by the fact that under the laws of the state, as they existed at the time of the

execution of the contract, irrigation districts were authorized to dispose of their bonds only by a sale for cash to the highest bidder or by an exchange thereof at par for irrigation works; they could not use them in payment for construction work. Such is the view taken by the Supreme Court of California of a law of that state, of the same general purpose and scope.

Hughson v. Carne, 115 Cal. 404; 47 Pac. 120. The same court later held that it was competent for districts to enter into contracts for the purpose of systems to be constructed.

Stowell v. Rialto Irr. Dist., 155 Cal. 215; 100 Pac. 248. It is to be inferred that the contracts here were drawn to conform with the views expressed in these decisions.

The Power Company entered into a contract for construction work on the system with Maney Brothers & Company, and later with the Slick Brothers Construction Company for the completion of the system. It settled with Maney Brothers by the execution of a note for a large amount, secured by a mortgage upon the system, only a small part of which was then completed, and with Slick Brothers Construction Company by a written agreement, pursuant to which it was to deposit with a trustee certain bonds and securities, the proceeds of which were to be paid out to creditors in the manner therein provided. At the time this suit was commenced there was due to Maney Brothers, on account of the mortgage note. $35,986.10, with interest thereon at the rate of six per cent from December 27, 1913. Accord-

ing to the contention of Slick Brothers Construction Company, there was also due to it a large balance, for which it had filed notice of a mechanic's lien, which it sought to foreclose in this suit. At the close of the trial I held that the Power Company had substantially complied with the agreement of settlement by placing the bonds and other securities in the hands of the trustee agreed upon, and therefore denied relief to Slick Brothers. Admittedly there is due to the plaitniff, the Portland Wood Pipe Company, $10,317.44, which is the basis of the lien upon which the complaint is predicated.

The system was completed, and in accordance with the contract between the irrigation districts and the Power Company it was conveyed in separate shares to the districts, and at the time the suit commenced they were the owners of the legal title thereto. As already stated, there is no controversy as to the amount due from the Power Company to Maney Brothers, or from Slick Brothers Construction Company to the Portland Wood Pipe Company, but the irrigation districts contend that they held the property free from both the mortgage and the plaintiff's claim of lien.

First disposing of

THE LIEN CLAIM OF THE PORTLAND WOOD PIPE CO.

Briefly stated, the districts' contention is that they are municipal corporations, that their property is dedicated to public uses, and that therefore it is exempt from the operation of the mechanic's lien laws of the

state. It is argued that while Section 5110 of the Revised Codes in general terms confers the right of lien upon any person performing labor upon or furnishing materials to be used in the construction of any work, the section is not to be deemed to extend the right of lien to property belonging to the state or municipal corporations. Attention is called to Section 5111, which expressly provides for a lien in favor of sub-contractors, laborers, and persons furnishing material (but not original contractors), in case of structures belonging to "any county, city, town or school district," and to still another provision of the law by which contractors are required to furnish bonds to municipal corporations, including irrigation districts, to indemnify not only the corporation, but also any person furnishing labor or material, and the conclusion is drawn from the several provisions that the legislature did not intend to provide for a lien in favor of either a material man or a laborer in the case of structures or improvements belonging to an irrigation district. It would be strange for the legislature to extend the right of lien to buildings and other property belonging to a county, city, town, or school district, and withhold it in the case of an irrigation district; and it is difficult to believe that such was the intention. But that question is not involved here. The material furnished by the plaintiff was for the construction of works belonging to the Power Company, not to the irrigation districts. It is true that the system was to be conveyed to the irrigation districts, but doubtless as they understood the law they could not contract to pay bonds for the construction of irrigation works, and

they therefore intended that the construction should be for the Power Company, and that they would buy the completed structures. That being the case, they took title subject to such liens as incumbered the property when it came into the possession and ownership of the Power Company, and very clearly the Power Company acquired title to the property subject to the liens of the workmen who built it and the material men who furnished the material for its construction. *Creer v. Cache Valley Canal Co.*, 4 Idaho, 280; 38 Pac. 653. *Garland v. Irrigation Company,* 9 Utah, 350; 34 Pac. 368; 163 U. S. 687. *Fosdick v. Schall*, 99 U. S. 235. *Holt v. Henley,* 232 U. S. 637. The districts will not be permitted to take a position now inconsistent with that which they maintained that before the plaintiff furnished the pipe material it made inquiry and learned the nature of the contract between the Power Company and the irrigation districts, and was thus advised that the irrigation districts did not claim that they owned the property, or that the Power Company was merely a construction company. There is no contention here that the districts required the Power Company to give a bond, which was their bounden duty to do if it was deemed to be a construction company. Undoubtedly the irrigation districts held out to the world that they were merely the purchasers of this property, and were not engaged in its construction. They cannot now be permitted to change their position, to the hurt of persons who in good faith dealt with the Power Company as the owner of the property.

I reject the suggestion that inasmuch as Slick Bro-

thers Construction Company entered into the contract of settlement already referred to, with the Power Company, and thus waived its lien, the right of the plaintiff was thereby cut off. The statute confers upon the material man an independent right to a lien, of which he cannot be divested without his consent.

THE MANEY BROTHERS MORTGAGE.

We now come to a consideration of the validity and dignity of the Maney Brothers mortgage. There is no dispute that there remains due thereon a balance of $35,986.10, besides interest from December 27, 1913, at the rate of six per cent per annum. The Power Company, mortgagor, makes no resistance, and the only defense is that interposed by the irrigation districts, which contend that under their contract of purchase and the subsequent deeds made in pursuance thereof, they took an unincumbered title to the property. As already stated, the contract of purchase was executed on August 22, 1910, whereas the mortgage was not made until September 29, 1911; and the deeds were all executed at still later dates. Presumably a question having arisen as to the status of the mortgage lien, the mortgagees on July 10, 1914, procured the passage of a resolution, at a joint meeting of the boards of directors of the two districts, expressing the view of the boards that the title received by the districts was subject to the mortgage, but there was appended an express disclaimer of any intention to waive any rights which the districts then possessed. It is scarcely necessary to observe that with this proviso the resolution did not even purport to en-

large the rights of the mortgagees. Later, namely, on August 18, 1914, the boards of directors, acting separately, passed a resolution ratifying a certificate executed by the president of each district, dated June, 1914, certifying to certain undisputed facts touching the history of the transaction and purporting to concede that the mortgagees' rights were superior to those of the districts. But both the certificate and the subsequent raification were without consideraion, and even were it to be assumed that an irrigation district may be estopped by the unauthorized acts of its officers, there were wanting here some of the essential elements of estoppel. I am therefore clearly of the opinion that both the resolutions and the certificates must be laid aside as having no efficacy whatsoever.

There remains the general question whether the transfer consummated by the deeds delivered from time to time as portions of the system were completed, relates back to the date of the contract and cuts off the intervening mortgage lien. It is conceded that for certain purposes at least this doctrine of relation is to be recognized, but it is not to be given effect here, it is argued, because it would work an injustice and it is never invoked where such would be the result. The supposed injustice lies in the fact that if the mortgage is defeated the mortgagor may be unable to recover all of the mortgage debt. The gist of the contention seems to be that in case of an executory contract for the sale of real property the vendor retains the power to transfer the legal title to a third person or subject it to a lien, and in such cases the transferree or mortgagee is subrogated

to the rights of the vendor, and is entitled to receive the unpaid portion of the purchase price. Specifically it is urged that the mortgage lien here attached to the unpaid purchase price, and that the districts having notice, both constructive and actual, of the existence of the mortgage, paid the Power Company at their peril. But the application of the principle to the facts in hand is not so plain or simple. The contract in question was for the purchase of an indivisible unit of property. No substantial part of it was in existence at the time the contract was made; it was largely to be created before it could be transferred. Admittedly, when completed it was to be conveyed free from all incumbrances. What then were the rights and duties of the districts? Clearly it was their right to take such course as was reasonably necessary to secure the performance of the contract, and, as already stated, one of the provisions of the contract was that they should receive title to the completed system free from incumbrances, of which condition mortgagees at all times had knowledge. Now what in fact did they do? So far as the record shows, they paid the purchase price by turning their bonds over to the Power Company to be used by it in procuring the construction of and title to the property conveyed by the contract, and the bonds were so used. In view of the record, it is idle to talk about withholding the purchase price and applying it to the discharge of the mortgage indebtedness. Had such a policy been suggested at the outset, the contractors would doubtless have declined to proceed with the work, and if it had been adopted after the work was done, mechanic's liens would have been asserted against the property. That the lien of those who, by supplying

labor and material, created the property, was superior to the equity of the districts, I have already held, and that it was superior to the mortgage lien is scarcely open to controversy. Under such circumstances, it was the right of the districts to see that the purchase price was applied to the discharge of the superior liens; those of contractors, laborers, and of material men. If we assume that thereafter it was their duty to withhold from the vendor and pay to the mortgagee the balance, it need only be said that there is no showing that there was any balance. So far as appears none of the bonds constituting the purchase price has been turned over to or retained by the Power Company for its own profit.

It is now quite immaterial that the mortgage indebtedness originated in construction work done by the mortgagees upon a branch of this irrigation system. If we assume that up to the time they took the mortgage their right to a mechanic's lien remained unimpaired, they abandoned that right by taking the mortgage. It may very well be true that if they had then insisted upon such a lien the project would have fallen through and they would have been left with worthless security. But, however, that may be, and whatever may have been their motives, they waived their statutory lien and took the mortgage, and their status here is that of a mortgagee and nothing more.

There is this further consideration: The districts, as we have seen, were under no obligation to pay the Power Company money; the price was to be paid in bonds. If the mortgagees were resting upon the theory that as holders of a mortgage they were in a sense

subrogated to the right of the Power Company to receive the purchase price, why did they not demand that a part of the purchase price be turned over to them? They apparently knew that the bonds were being delivered, and yet made no demand or protest. Great difficulty was experienced in negotiating the bonds even at heavy discounts. From the record can we say that the mortgagees would have been willing to take them at their face value or for that matter at any price? Upon their own theory, their mortgage at most conferred upon them a conditional right to receive a part of the unpaid purchase price. But the purchase price consisted not of money but of bonds, and at no time during the entire transaction did they intimate a willingness to accept bonds, nor up to the present time have they manifested such willingness. They are insisting upon the payment of their claim in money. As against their debtor, the Power Company, such is their right, but in view of the law, upon any state of facts either real or assumed, was it ever the duty of the districts to pay them any part of their demand in money. In view of these considerations it is thought that the lien of the mortgage does not extend to such property rights and interests as were covered by the contract and have been conveyed to the districts pursuant to the terms thereof. A foreclosure will therefore be granted only as to the other property described in the mortgage, including the interest reserved by the Power Company in the irrigation system.

As to attorneys' fees, possibly the amount testified to, namely, $1,000.00, would not be excessive for the Portland Wood Pipe Company, if counsel who rep-

resent it were not otherwise employed in the case, but taking into consideration the fact that the same counsel also represent the mortgagees and Slick Brothers, I am inclined to think $750.00 will be an adequate allowance on this account. As to Maney Brothers, their principal controversy, namely, that their lien extends to the property of the Irrigation Districts, is found to be without valid basis, and insofar as the legal services pertain to that controversy, they must themselves bear the expense. For other services they are entitled to recover, and $1,000.00 will be awarded on account thereof.

My conclusion as to the Slick Brothers claim was announced orally. As to the Comerford claim, after a ruling upon the controlling questions, I am advised of a complete settlement between the interested parties. Both the cross-complaint and the counter-claim will therefore be dismissed as settled.

Creer and others vs. Cache Valley Canal Co., 4 Idaho 280, 38 Pac. 653, 654. This case, in many particulars, is in point with the question under discussion, and I quote from the same as follows:

> "Suit by William O. Creer and others against the Cache Valley Canal Company and others for a balance claimed to be due for work and labor done by them in the construction of two canals for the defendant the Cache Valley Canal Company, and for a first lien upon said canal to secure said claim. Decree in the court below gave plaintiffs judgment for the amount claimed, and first lien upon the canal to secure the sum, and defendants appeal. Affirmed.

The stipulation of facts agreed upon in this case shows: That the Cache Valley Canal Company on or about the first day of May, 1892, constructed a main canal running from the Soda Springs, along the Oregon Short-line Railroad, to the NE ¼ of Section 1, in Township 9, S., Range 40 E., P. M. and about 4½ miles of the South Branch of said canal—in all, about 14 miles. On the 18th day of June, 1892, the Cache Valley Canal Co. executed a mortgage to James Thompson for the sum of $25,000 upon all of the canals thus constructed and upon those to be thereafter constructed. That the money so obtained by said mortgage was used in the construction of said canals, including that part on which the plaintiffs now claim a lien. On the 11th day of July, 1892, the plaintiffs made a contract with the Cache Valley Canal Co. by the terms of which the said plaintiffs were to construct what is called the "North Branch" of the said canal, for which they were to receive a certain stipulated price. They also agreed to construct what was termed the "South Branch and Laterals" of said Company's canal for a certain other stipulated sum. That the said plaintiffs fully performed their contract as before set forth, and completed said work on the 27th day of October, 1892. It is also stipulated that, if the plaintiffs are entitled to recover at all, the amount claimed in the complaint, and interest as claimed, is the amount that should be allowed; that the lands whereon said canal was constructed were then public lands of the United States, with the exception of three-quarter sections; that at all times

mentioned in the complaint, as fast as the said canals were constructed by the plaintiffs, as alleged in the complaint, the defendant the Cache Valley Canal Co. was the owner thereof; that in November, 1892, the said Cache Valley Canal Co. sold and transferred all of said canal's right-of-way, as far as said Company had acquired it to the Cache Valley Land and Canal Co.; that in April, 1893, the said last named Company acquired the right-of-way over all the public lands where its canal was constructed; that the plaintiffs herein were original contractors under the contract sued on."

"This appeal exhibits a most extraordinary state of facts. It is stipulated that the defendants owe the plaintiffs the sum demanded in their complaint, with interest thereon. It further appears from the record: That quite a large part of the property upon which this lien is claimed, and upon which the said James Thompson claims to have a mortgage, which he wishes the court to declare to be a prior lien to that of the plaintiffs, had no existence whatever when this said mortgage was given. That the plaintiffs constructed the whole of the North and South Branches of said canal after this mortgage was given, except about 4½ miles, which they had constructed before. The plaintiffs actually created this property which made the mortgage of the said Thompson, who is the appellant in this case, good; that is, the North and South Branches of the canal were not built—had no existence—when the mortgage was given. That they were built

by said plaintiffs, for which construction they have not been paid, except in part. And this suit is brought to secure the balance of the money that the defendants acknowledge was due plaintiffs for said work; and this court is asked to assist in preventing the plaintiff securing their pay, on technical objections, that are themselves without foundation. This appeal has no merit whatever."

Gardner et al. vs. Leck et al. The Minnesota case can be found in the 54th Northwestern Reporter at page 746, and we quote from the same, pages 748 and 749, as follows:

"There is nothing novel or unjust in a law which gives priority to the liens of mechanics and material men over those of other parties, originating subsequent to the commencement of the improvements on the land. In at least 20 states such laws have been enacted, and again and again have they been sustained by the courts. These states are named, and a synopsis of their lien statutes given, in Jones on Liens (sections 1187 and 1469). * * *

"The inevitable logic of what we have said is that, whenever a mortgage or other incumbrance or distinct lien originates subsequently to the commencement of the work on the ground, or the furnishing of materials at the same place, so that the world may have notice of the proposed improvement, it must yield to the claims of all who have contributed to the completion of the structure with their work or materials."

Oriental Hotel Company et al. vs. John Griffiths et al, 30 L. R. A. 765; 33 Southwestern 652; 53 American State Report 790. This is a case from the Texas Supreme Court and we quote from the LRA report, pages 776, 777 and 778, as follows:

> "The parties contracted with reference to and in view of the law as it then existed, and must be charged with notice of such rights as might accrue in the course of constructing the building, even if they had not been actually contemplated by the parties. *Brooks v. Burlington & S. W. R. Co.,* 101 U. S. 451, 25 L. Ed. 1060. When a building or other improvement is in course of construction, and any person takes a mortgage on the land upon which such building or improvement is situated, or on the improvement itself, he does so with the knowledge that it may be necessary for the completion of the building that other contracts should be made for labor and material, and it is clearly the policy of this state, as shown by its statute law, that an intervening mortgagee shall not destroy the statutory rights of persons that may be acquired thereafter in the course of constructing such building. The deed of trust in this case expressly reserved a lien upon the building thereafter to be constructed, and it is evident from the facts that the principal security of the bonds which were being sold was to be created by the completion of the contemplated hotel building. If the position taken by the counsel for the Oriental Investment Company be correct, then an intervening mortgagee could arrest the

progress of such work, destroy the statutory rights and liens of all persons who might be engaged in the work, and assert a lien by contract which would be superior to that given by the law under which the contract was made. This, we believe, cannot be maintained. * * *

"If the construction claimed by the plaintiffs in error be given to the statute of this state it would result in many absurd and unjust consequences. For example, let us suppose that Griffith's contract called for the completion of the hotel building, except the portions for which the other plaintiffs furnished material or upon which they performed labor, and that Griffith's contract had been complied with and the building completed, except the portions last named, and that after this was done Griffith's claim remaining unpaid, the deed of trust had been executed, as it was in this case, before the contracts were made under which the other plaintiffs acquired their rights. Now, by the construction claimed, Griffiths would have a prior lien upon the entire building, including all that the other plaintiffs had furnished, either in material or labor, and yet they who furnished the material or labor would have only a second lien thereon, for the reason that the mortgage intervening would take precedence over them. If we adopt the construction of the statute which seems to have been applied by the district court and approved by the court of civil appeals, the result will be, in such case as that stated above, that Griffiths would have his lien upon all the

work completed by him, and would be allowed to participate in the proceeds of that which had been added by the other plaintiffs, while they would be denied their statutory right to participate with him in the portion completed before the mortgage was given. Suppose that Griffiths had the entire contract for building the house, except the plastering and painting, and that, before the plastering and painting were done, the mortgage had been given; then the result would be that Griffths would have his lien upon the entire building, painted and plastered, while the other parties, who did the plastering and painting, and furnished the material therefor, would have a lien, equally with Griffiths, only upon the plastering and painting as it might be upon the walls, woodwork, or other parts of the house. Would it be practicable to separate these, in case of a foreclosure of the lien and sale, so as to adjust the rights of the parties in the proceeds of that portion consisting of the plastering and painting? In fact, it would be almost impossible to construct a house of any considerable value, except upon cash payments, without making such complications between the parties as would render it impracticable, if not impossible, to adjust their equities under any such rule of construction as that upon which this judgment is based. When a statute is plain and unambiguous in its terms, and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but must enforce the law as they find it. But when a statute is ambiguous in its terms,

or susceptible of two constructions, then the evil results and hardships which may follow one construction may be properly considered by the court, and it is right that the court shall place upon the statute that interpretation, of which it is fairly susceptible, which will attain the just solution of the questions involved and protect the rights of all parties. Sutherland, Stat. Constr. Sec. 324. The construction that we place upon the statutes of this state, to the effect that when the erection of any building or construction of any improvement is begun, that constitutes the inception of all subsequent liens, is consistent with the entire body of the statute laws of this state on the subject, preserves the equality of all those who contribute to the construction of the building, and affords an easy solution and just result in case of intervening liens; for it is but just that he who acquires a lien upon property under such circumstances, and seeks to derive to himself the benefits of the improvement to be made, enhancing in value the security thus obtained, should be charged with notice that those who thereafter perform labor upon or furnish material for the completion of such improvement will be protected, under the law in the liens created by the statute. *Brooks v. Burlington & S. W. R. Co.,* 101 U. S. 443, 25 L. Ed. 1057."

Davis v. Bilsland, 18 Wallace 659, 21 L. Ed. 969. We quote from the Wallace report, from page 661, as follows:

"Thirdly. That the mortgage of the defendant

was entitled to priority over the claims of the plaintiff, which were not filed till November, 1869, and Bilsland did not commence work until after the mortgage was given.

"The language of the eigth section of the mechanic's lien law of Montana is unambiguous. The liens secured to the mechanics and materialmen have precedence over all other incumbrances put upon the property after the commencement of the building. And this is just. Why should a purchaser or lender have the benefit of the labor and materials which go into the property and give it its existence and value? At all events the law is clear, and the decree was right."

Judge Dietrich, in the opinion we have heretofore set out, cites *Holt v. Henley,* 232 U. S. 637, 24 Supreme Court Reporter 459. That case, on page 460 of the Supreme Court Reporter, cites a great many other cases. All these cases deal with the "after acquired property" clause of mortgages, and all of these cases deal with personal property after acquired instead of real estate, but there cannot be any difference upon principle in this line of cases than the doctrine we seek to revoke in this case.

Garland v. Bear Lake & River Water Works & Irrigation Company, 9th Utah 350, 34 Pacific 368, is another one of the cases cited by Judge Dietrich in the opinion above quoted, and we quote from the Pacific Reporter, page 370 and 371, as follows:

"The Jarvis-Conklin Mortgage Trust Company

insist that the court below erred in holding that the lien in favor of Corey Bros. & Co. on the canal was superior to the trust deed on the same property to secure its debt. "It is true that the Jarvis-Conklin Mortgage Trust Company obtained their deed of trust before Corey Bros. & Co. commenced work, and that the deed, by its terms, included all the property the water and irrigation company then had, or might thereafter acquire. When mechanics, material men, or other persons make improvements on land on which there is a mortgage or trust deed, such mortgage or trust deed will be superior to the lien to secure the mechanics or other persons; but the water and irrigation company had no ditch or canal which the deed of trust could transfer to the trustee, until Corey Bros. & Co., by their labor, brought it into existence, and as fast as they constructed the canal their lien attached to it. The trust deed could not transfer the canal from the water and irrigation company to the trustee until it was constructed; until the property came into existence. Under the mechanic's lien law relied upon, we do not think a man can execute a deed of trust on a canal to be constructed on the public lands, and then employ men to build it, and after they have done so, and claim the security of the lien, turn upon them, and say he had transferred the property to a trustee before their labor had brought it into existence. We are of the opinion that the court below was correct in holding the lien of Corey Bros. & Co. superior to the trust deed."

At the time Maney Brothers & Company received the note and mortgage from the Crane Creek Irrigation Land & Power Company, on the 29th day of September, 1911, it knew that prior to that time a contract had been entered into between the Crane Creek Irrigation Land & Power Company and these two Irrigation Districts; and it knew that the contracts with the Districts provided that the Crane Creek Irrigation Land & Power Company was bound to convey the property described in these contracts to these two Districts free from all incumbrances. It is a clear case of Maney Brothers & Company entering into a contract that it knew might result in the Crane Creek Irrigation Land & Power Company violating its contracts with the Irrigation Districts. Maney Brothers & Company knew that, if its mortgage was not paid prior to the time it became the duty of the Power Company to convey to the Irrigation Districts, that the above agreement to convey free from incumbrances would be violated, if the mortgage could be enforced against the Districts. Maney Brothers & Company do not come into this court with clean hands.

Maney Brothers & Company's mortgage calls for $87,000.00. Maney Brothers & Company were to build a reservoir and we suppose it was worth $87,000.00. It has been paid over $50,000.00 on its note and mortgage. There is still due it something in the neighborhood of $36,000.00.

It was not satisfied with taking a mortgage upon the work it did, but it is here claiming that it has a first

lien upon all the work done under the contract with Slick Brothers Construction Company, Ltd. Several hundred thousand dollars have been spent upon the work done ,under Slick Brothers Construction Company Ltd.'s contract.

When Maney Brothers & Company took its said mortgage, it knew that laborers and material men would put several hundred thousand dollars in the flumes, canals and siphons and ditches on this irrigation project; and it now claims that it is entitled to a lien for work it did on another part of the irrigation system superior to the claim of the laborers and material men that have done this additional and subsequent work.

There is not any equity or justice in such a proposition, but Maney Brothers & Company content themselves with resting upon what they call the vested rights of a mortgagee.

If Maney Brothers & Company thought they had a valid mortgage against the Irrigation Districts, why have they waited all this time to enforce this mortgage? They never did attempt to enforce it and they set up this vested-right-cry only after they are brought into court by the Portland Wood Pipe Company in attempting to collect its just debts and dues.

A good deal has been said in this record about the resolutions of the two Irrigation Districts and about the certificate of some of the officers of these Irrigation Districts, attempting to bolster up the mortgage of Maney Brothers & Company, attempting to give a

standing and validity. If one has a valid mortgage, he never attempts to bolster it up by resolutions and certificates and affidavits; he never tries to make some record some place else that will make such mortgage better than the mortgage record itself; he never tries to prop up, nor brace up, nor bolster up the record that he obtained in the ordinary way in filing his mortgage in the record provided by law. The very fact that all this attempt was made to establish the validity of this mortgage convinces us that Maney Brothers & Company doubted the validity thereof, as against these Irrigation Districts.

Maney Brothers & Company, if this mortgage had not been given, would have had a valid mechanic's lien upon the work that it did in the performance of its work under its contract with the Crane Creek Irrigation Land & Power Company. Maney Brothers & Company were not satisfied with this; it wanted something better. It not only wanted a mortgage upon the work it did, but it wanted a mortgage upon all the work anybody else ever did on this large irrigation project in these two Irrigation Districts. We believe it is perfectly apparent, from the record here, that, when Maney Brothers & Company built this reservoir, provided for in its contract, all the rest of this irrigation project was on paper. As a matter of fact, the reservoir would not be worth anything unless the balance of the irrigation system was completed.

This work of the Portland Wood Pipe Company, and others, breathed life into this paper irrigation pro-

ject and made it worth something, and made the mortgage of Maney Brothers & Company worth something. It seems to us that Maney Brothers & Company have overshot the mark. It seems to us they have been too avaricious. It seems to us it must shock the countenance of a chancellor when any one attempts to take an advantage of a situation such as this, and when one attempts to profit to the hurt of another, and reap where he has not sowed.

It is apparent that Maney Brothers & Company knew that from time to time the Power Company was executing and delivering its deeds to these Irrigation Districts, as the work was being completed, and it never objected; it never protested to the Irrigation Districts; it never protested to the Power Company. It thought that it would wait until the Portland Wood Pipe Company, and others similarly situated, had put their good money, labor and material into this irrigation system, and then it thought it would attempt to esablish a first lien thereon, and a lien thereon prior to the lien of any laborer or material man.

Judge Dietrich clearly saw this whole situation. He had before him the witnesses and he saw the iniquity and injustice of Maney Brothers & Company's attempt to shut out the material man and the laborer, and he could not be swayed by the sophistry of the vested rights of a mortgagee. His decision in this regard should be upheld.

WHEREFORE, the appellee, the Portland Wood

Pipe Company, respectfully submits that the decree of the District Court should be affirmed.

Respectfully submitted,

WILBUR, SPENCER & BECKETT,

Solicitors for Appellee, Portland Wood Pipe Co.

Residence, Portland, Oregon.

No. ~~2645.~~

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MANEY BROTHERS & COMPANY, A CO-PARTNERSHIP CONSISTING OF J. W. MANEY, HERBERT G. WELLS, AND E. J. WELLS,

Appellants,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, L'T'D, A CORPOPATION, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD, R. C. McKINNEY,

Appellees.

CRANE CREEK IRRIGATION DISTRICT AND SUNNYSIDE IRRIGATION DISTRICT,

Appellees and Cross-Complainants,

vs.

MANEY BROTHERS & COMPANY, A CO-PARTNERSHIP CONSISTING OF J. W. MANEY, JOHN MANEY, HERBERT G. WELLS, AND E. J. WELLS,

Cross Appellees.

Brief for Appellees and Cross-Appellants.

C. S. VARIAN,

Solicitor for Appellees and Cross-Appellants.

Residence, Salt Lake City, Utah.

E. R. COULTER,

Of Counsel.

Residence, Weiser, Idaho.

No. 2645.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MANEY BROTHERS & COMPANY, A CO-PARTNERSHIP CONSISTING OF J. W. MANEY, HERBERT G. WELLS, AND E. J. WELLS,

Appellants,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, L'T'D, A CORPOPATION, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD, R. C. McKINNEY,

Appellees.

CRANE CREEK IRRIGATION DISTRICT AND SUNNYSIDE IRRIGATION DISTRICT,

Appellees and Cross-Complainants,

vs.

MANEY BROTHERS & COMPANY, A CO-PARTNERSHIP CONSISTING OF J. W. MANEY, JOHN MANEY, HERBERT G. WELLS, AND E. J. WELLS,

Cross Appellees.

Brief for Appellees and Cross-Appellants.

STATEMENT OF THE CASE.

The appeal and cross-appeals herein are taken from the decree of the District Court given in the case of the Portland Wood Pipe Company, a corporation, plaintiff, vs. Slick Brothers Construction Company, Ltd., a cor-

poration, et als., defendants, and are to be argued and considered at the same time with the appeals taken by Crane Creek Irrigation District and Sunnyside Irrigation District, appellees and cross-appellants here, from that portion of the said decree charging a mechanic's lien against the property of the said district.

Maney Brothers & Company filed a cross-bill in the original suit setting up a mortgage given by the Crane Creek Irrigation Land & Power Company, an original defendant in the suit (hereinafter called "Company") on September 29th, A. D. 1911, to the said Maney Brothers Company, and upon certain lands described in the mortgage (which was annexed to the bill as Exhibit "A," Transcript 29) on the reservoir and site, dam, canals, ditches, head gates, flumes, pipe lines, laterals, and other structures, dams and works used or intended to be used or required in connection with the distribution of the water from the reservoir, and for carrying and distributing the water to the place or places of intended use now owned or constructed or *which may hereafter be acquired or constructed by the mortgagor* with the rights-of-way therefor; all water rights and rights to the use of water in connection with the reservoir and irrigation works "now owned or that may hereafter be acquired," by the mortgagor, and also upon certain permits issued by the State Engineer of Idaho and described by number and record.

The habendum clause included all the "described real, personal and mixed property, and the rights, franchises, contracts, mortgages, notes, bonds, water rights and permits, rights-of-way, reservoirs, dams, canals, flumes, pipe lines, ditches, and other structures forming a part of said irrigation system now owned by the mortgagor or hereafter constructed or acquired by the mort-

gagor, with all the eastments, rights-of-way, privileges and appurtenances thereunto belonging or in any wise appertaining."

The mortgage was given to secure the payment of a promissory note, of even date therewith, whereby the Company promised to pay Maney Brothers & Company on November 15th, 1912, $87,000, with interest at 6% per annum from November 15th, 1911. (Transcript 29, 30, 31, 34, 35.)

It was alleged that after the execution of said note, but before its delivery to cross-complainant, the individual defendants, E. D. Ford, A. G. Butterfield, and R. C. McKinney, for value received, endorsed the same in writing, waiving presentation, demand, protest and notice of non-payment. (Transcript 25.)

The mortgage contained provisions authorizing the mortgagor to carry out its contract of August 22nd, 1910, with the irrigation districts, but stipulating that the mortgagee should not be required to release the lien of the mortgage on any of the property described or to be conveyed under the aforesaid contract until there should be deposited as additional security with a certain bank cashier, as trustee, $75,000 in the case of one district and $50,000 in the case of the other district, par value of legally issued bonds of the districts, they having first been approved by the Supreme Court of Idaho; but upon such bonds being delivered, the mortgagee agreed to release from the lien of the mortgage, the interest to be conveyed to the mortgagor to the districts. (Transcript 37, 38.)

The mortgage further provided that the mortgagor might sell bonds deposited with the trustee of the two districts, or any part thereof, at not less than 75% of

their par value, applying the money received therefor upon the indebtedness secured by the mortgage.

The mortgage further provided that "the contracts which the mortgagor has with the irrigation districts herein mentioned and all extensions thereof and amendments thereto that may hereafter be made, are hereby assigned to the mortgagees hereunto as the security for the indebtedness secured hereby." (Transcript 42.)

The Company answered the cross-bill substantially admitting the allegations thereof, and the irrigation districts answered severally admitting the execution of the mortgage and note, the amount due thereon, and alleged the organization of the districts pursuant to law, and that on the 29th day of September, A. D. 1911, Maney Brothers & Company entered into a contract with the Company, the original contractor in the construction of the system, to furnish materials and perform labor for the Company in consideration of approximately the sum of money mentioned in the note and mortgage; and that before any materials had been furnished or work performed, the said Maney Brothers & Co. procured from the Company the said note and mortgage; that the Company was not authorized in law to charge the property of the districts with the mortgage lien for the payment of the costs of construction, and that the mortgagee had no authority to so contract with the Company, (the answers of each district are the same. Transcript 66, 70, 82, 85, 86.) Witness, E. D. Ford, testified that the first construction work done on the project after the contracts with the districts were made, was in October, 1911, and that was done by Maney Brothers and consisted of building the dam or reservoir site; that no work has been done on the dam in the way of construction since, and that the

mortgage to Maney Brothers was given in connection with that work; that he advised the districts of the giving of the mortgage about the time it was given; that he prevailed upon the districts to execute Maney Brothers Exhibit No. 6, in order to get certain concessions from them. (Transcript 165, 166.)

Exhibit No. 6 purports to be a resolution by the directors of the Crane Creek Irrigation District adopted June 15th, 1914, relating to the mortgage, and probably intended to ratify the act of the President in executing and delivering a resolution stating that the districts had no defense against the mortgage, "and the conveyances that have been made to said reservoir, and the conveyances that may be made by the Crane Creek Irrigation Land & Power Company to them of the interest in said reservoir, and all conveyances which may be made prior to the satisfaction of the said mortgage, will be subject to the lien of the said mortgage." (Transcript 157, 158.)

A similar resolution was adopted by both districts in joint meeting on July 10th, 1914, and still another appears in the record also as of date June 15th, 1914. Maney Brothers Exhibit 4-Exhibit 5. (Transcript 151, 154, 157.)

On the day of the execution of the note and mortgage the Company and the mortgagee entered into a contract in writing for the construction of the dam at the reservoir site known as the Crane Creek dam. This contract provided that simultaneously with its execution, the Company should execute the note with the endorsements of the individual defendants hereinbefore mentioned and would mortgage upon all its property rights and franchises as security for the payment of the said note and any and all other sums due or to become due;

and that the note should be deposited with a trustee to be delivered to the mortgagee upon a certificate by the engineer of the Company that the work had been completed in accordance with the terms of the agreement. (Transcript 90, 95, 96.)

The orginal contract between the irrigation districts and the Company of August 22nd, A. D. 1910, was in evidence and marked "Sunnyside and Crane Creek Irrigation Districts' Exhibit 'B' ". By this contract, (paragraph 2) the Company agreed to sell and convey, and each district agreed to purchase certain percentages of interest in and to certain permits, water rights, rights-of-way, canals, flumes and laterals, and in all canals, pipe lines, flumes and aqueducts situate wholly without the boundaries of the district; and also the main canals, distributing laterals, pipe lines and flumes situate wholly within the boundaries of the district. (Transcript 104, 105.)

The Company also agreed to convey to the districts certain percentages of interest in and to the water rights and reservoir site, excepting right of possession thereof, which was to be held until final conveyance; "and upon the completion of any portion of the said irrigation system, as shown by each monthly estimate in the construction thereof, the Company agrees to convey to the districts such completed portion with the same proportions of the rights-of-way for such system; and upon the completion of the whole of such system within the time above specified, to convey the whole of the undivided interest in and to said water rights, appropriations, reservoir sites, rights-of-way, canals, dams, pipe lines, flumes, laterals and other structures, with the appurtenances contemplated in this agreement, and agreed to be sold and

conveyed hereunder, together with the possession thereof to the district."

In consideration of the delivery by the district to the Company, coupon bonds of the face value of $100,000 and of deliveries by the district to the Company upon receipt of the conveyance above erferred to, coupon bonds at face value to an amount equal to such part of the entire bond issue of the district to be sold and delivered under the contract as the constructed portion of the works of the Company bore to the entire work to be constructed for the use and benefit of the district, the Company agrees to make the aforesaid conveyances. (Paragraph 7, Transcript 107.)

In consideration of the agreements by the Company, and in full payment of the said system to be sold and conveyed when completed as in the contract provided, the district agreed to deliver to the Company its coupon bonds at their face value to the amount of $415,000. (Paragraph 8.) It was further provided that all conveyances should be by sufficient deed, and that all properties conveyed should be free and clear of all incumbrances. (Paragraph 11, Transcript 107, 108, 110.)

The Company agreed to furnish the district 24,900 acre feet of water each season, to be stored in the reservoir and to be used as desired by the district during the irrigation season as part of the consideration of the contract, with the proviso, however, that in the event of a shortage of water and the water stored should not equal the maximum amount therein under ordinary conditions in ordinary years, that the districts should pro rate with the other tenants in common of the reservoir. (Paragraph 15.)

It was further agreed that the exclusive right to the perpetual use of all water stored in the said reservoir site at any point or points between the dam and the head gate of the main canal, was reserved to the Company, its successors and assigns forever, provided, however, that such use should not in any way interfere with the use of the said water by the District when needed for irrigation purposes (paragraph 18); and that the use of the water furnished to the Districts under the contract should be limited to the certain specified tracts included within the boundaries of the Districts as the same existed at the time of the bond issue, and against which are assessed the benefits of the system. (Paragraph 19. Transcript, 113-114.)

It was also agreed that the Company reserved, and should have the sole right to contract for and sell in the future, any and all water which may be needed by any lands within or without said Irrigation District as the boundaries thereof now exist, or as they may be hereafter extended, against which no benefits or merely nominal benefits are assessed, and to have the use of any canals or laterals owned by the District to transport the same under the direction of the District to the persons to whom it may sell water (paragraph 20); provision was made for the giving of bonds to each District in the sum of $100,000 by the Company, conditioned for the faithful performance of the contract and the construction of the work. (Paragraph 27, Transcript 114-119.)

The resolution of July 10, 1914, (Exhibit No. 4) contained the following statement, to-wit:

> "But, Be It Further Resolved, That, in passing this resolution, the said Districts do not waive any rights which they may have in the premises, and

> in the event that their interpretation of the law of the case is incorrect it shall not be the intention of said Districts to waive or relinquish any right which they may or might have in the premises.'' (Trans. 153.)

Ford testified, as shown in the record of the case, No. 2645, on appeal by the Districts against the Portland Wood Pipe Company, that the Company, at the time of the execution of the original contract of August 22, 1910, was the owner of a partially completed irrigation system; that the Company had actually completed nothing, but had acquired a right of way as a resevoir site and certain rights to waters and water appropriation. (Trans. 80.)

The Decree of the court below allowed a mechanic's lien against the System, but refused to charge the alleged mortgage lien against an interest in the property of the Irrigation Districts, but charged it against the interests of the Company in the System and the lands covered by the mortgage. It gave judgment against the Company and the individual defendants Ford, Butterfield, and McKinney, for the amount due on the note, and directed a sale of ''all the property hereinbefore described and upon which the mortgage of said cross-complainant has herein been adjudged and decreed a lien''; and directed that the contracts between the Company and the Irrigation Districts of August 22, 1910, in so far as the same had not been modified or changed by supplementary contracts between the parties ''shall be binding upon the purchaser or purchasers, their grantees, successors or assigns, under any sale or sales had in satisfaction of the lien or claim of said Maney Brothers & Company, and that the purchasers under the sale should take only such interest in the system as the Company had or was entitled to hold and retain under its existing contracts which the Dis-

tricts entered into prior to the filing of the cross-bill of said Maney Brothers & Company." (Trans. 207-208.)

The Districts severally appeal from so much of the Decree as charges the mortgage lien "upon all the right, title and interest of said defendant, Crane Creek Irrigation Land & Power Company, in the lands and premises, reservoirs, canals, irrigation works, structures, water rights, comprising and being a part of the irrigation system of this cross-defendant ———————— Irrigation District"; and from so much thereof as charges any part of the irrigation system of * * *with the lien of said mortgage, and adjudges a sale of said system." (Trans. 229-233.)

ASSIGNMENT OF ERRORS.

Comes now the cross-defendant, Crane Creek Irrigation District, and makes and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 12th day of June, A. D. 1915, in said cause:

I.

The U. S. District Court for the District of Idaho, Southern Division, erred in adjudging by its said final decree herein, that the mortgage of cross-complainant, Maney Brothers & Co., was a charge and lien upon the lands and premises, reservoir, canals, irrigation works, structures and water rights comprising the irrigation system constructed by the Crane Creek Irrigation Land & Power Company, defendant herein, under a contract with this cross-defendant, and cross-defendant Sunnyside Irrigation District, and which had been theretofore, and

was at the time the said alleged mortgage was given, dedicated to public uses.

II.

The said Court erred in adjudging that the mortgage executed by the Crane Creek Irrigation Land & Power Company, a corporation, to the cross-complainant, Maney Brothers & Co., a co-partnership, on the 29th day of September, A. D. 1911, was a first charge and lien upon all the right, title and interest of the said defendant, Crane Creek Irrigation Land & Power Company, in the lands and premises, reservoir, canals, irrigation works, structures and water rights of the irrigation system constructed as hereinbefore stated, by the said Crane Creek Irrigation Land & Power Company, for this cross-defendant Crane Creek Irrigation District, and cross-defendant, Sunnyside Irrigation District, and dedicated to public uses.

III.

The said Court erred in adjudging that the said mortgage was a valid charge and first lien upon an undivided 30.4% of the said hereinabove mentioned irrigation system, superior to the right, title and interests of this cross-defendant, and of cross-defendant, Sunnyside Irrigation District.

IV.

The said Court erred in not adjudging and decreeing that the said mortgage executed by the Crane Creek Irrigation Land & Power Company on the 29th day of September, A. D. 1911, and delivered to the said cross-complainant, Maney Brothers & Co., a co-partnership, as

security for the indebtedness accrued and to accrue to the said co-partnership from the said Crane Creek Irrigation Land & Power Company, through and because of the construction of said irrigation system, was invalid, in that the said Crane Creek Land & Power Company had no authority or power vested in it to execute a mortgage upon said property, or any part thereof, and because in all the premises the said cross-complainant, Maney Brothers & Co., had actual knowledge and notice that the property hereinbefore and in said decree mentioned, had been and was dedicated to public uses, and there was no authority vested in the Crane Creek Irrigation Land & Power Company to charge the same with a valid mortgage lien.

V.

The said Court erred in adjudging that the alleged interest of the Crane Creek Irrigation Land & Power Company in the irrigation system of this cross-defendant, and of the cross-defendant, Sunnyside Irrigation District, should be sold at public sale; and the said court erred in adjudging that any part of the said system should be sold at public sale to satisfy the claim of the cross-complainant, Maney Brothers & Co., because under the law and the statutes of Idaho, the said property, and the whole thereof, was and is exempt from execution or foreclosure sale and the said court had no authority in the premises.

Wherefore, this cross-defendant prays that the judgment of the said District Court of the United States for the District of Idaho, Southern Division, be reversed, and that the said court be directed to enter its decree denying a foreclosure of the said mortgage against any of the

public property hereinbefore mentioned and described, with such other and further relief to which this cross-defendant may be entitled.

The Assignment of Errors is the same for each defendant and cross-appellant. (Transcript 220-223.)

ARGUMENT.

The situation made by these several appeals is a peculiar one, to say the least. The original bill, the cross-bill of Slick Brothers Construction Company, the cross-bill of Maney Brothers Company, assert, each for itself, a priority of right upon the property of the Districts and that the alleged liens of each of the others is subordinate. They also alleged that the whole of the property was necessary for the convenient use of the system and must be sold as one parcel, and the several prayers were to that effect. The same solicitors conducted the several proceedings, and it now appears that the interests of the mechanics' lien claimant and mortgagee are in conflict.

The contentions of counsel appear to be, that a contractor having the contract with an Irrigation District to construct, sell and convey part or the whole of an irrigation system for the use of Irrigation District, may, although the amount, character and times of payment for the work are definitely ascertained and fixed in his contract, charge the property as it comes into existence, with a lien of a mortgage given by the contractor to a third person.

In the instant case, the mortgage purported to cover not only all of the interest of the mortgagor, but all interests that it might thereafter acquire, and it even attempted to assign to the mortgagee the contracts the

mortgagor had made with the Districts to construct and convey the system, or certain percentages of interest therein.

Our contention is, as set forth in the brief for the appellant Districts in case No. 2645 on appeal from the decree charging a mechanics' lien against the property, that such a lien does not attach to property of this class under the laws of the State of Idaho, and in that brief we have set out such portions of said laws as we deemed necessary to arrive at a proper understanding of them, and we refer to those statutes as they appear in that brief. If we are upon certain ground as to mechanics' liens, it would seem that the same reasoning applies in the case of a mortgage lien. If the reason moving the law-making power to exempt property of this class from mechanics' liens is sound, it applies to and should be equally as effective in denying the right to mortgage property of this class. No one will contend that in the absence of a statute expressly permitting it to be done, the directors of Irrigation Districts could mortgage any part of the irrigation system in order to pay the claims of the contractor who has furnished material or performed labor in the premises. But, strange to say, it is contended here that a contractor may, at the time of the execution of his contract with a sub-contractor to construct and convey an irrigation system, or a part thereof, charge property not yet in existence with a lien of a mortgage given to secure the sub-contractor. If this could be lawfully done, it would furnish an easy way of avoiding the law forbidding the charging of such property with mechanics' liens. We have here a striking illustration of the absurdity of recognizing the right to charge property of this kind or any part thereof with

mechanics' or mortgage liens. In case of the mechanics' lien the court has charged the entire system with the payment of that lien, but the mortgage lien is only charged against a supposed reserved interest of the mortgagor in the property. In both instances, however, the property is to be sold as a whole and the purchasers, by the judgment of the court, are to hold it subject to certain provisions of the contract made with the Districts. But since the right to own property necessarily includes the right to manage it, if this decree shall stand, we have a divided administration. The Board of Directors, as public officers appointed and entrusted by law with the administration of the affairs of the Districts, are to admit strangers to the trust as tenants in common with them, of the irrigation system. It must be remembered that this property can only be administered as a whole and if there shall be a separation of its component parts and interests, the object and purpose of its creation will be fatally impaired.

In the brief of counsel it is stated that "No question has been raised as to the validity of the Maney Brothers mortgage. It is conceded that it was properly authorized and executed by the mortgagor, and that it was recorded in the proper county immediately after its execution," and that the Districts had actual as well as constructive knowledge of the existence of the mortgage from the time it was executed. In view of the fact that we claimed in the court below, in a printed brief filed, that "this mortgage transaction was fraudulent on the part of the Company and the mortgagee," and always insisted that the mortgage was invalid as to any part of the irrigation system, this statement is surprising. Suppose the Districts, through their officers,

had knowledge of the making, of the execution and recording of the mortgage, how does that affect the question here? What were they called upon to do with reference to the mortgage? They could do nothing in the premises but await an attempted assertion of the lien through foreclosure proceedings and then defend against it. The mortgagee had notice and knowledge of the boundaries of the Districts and their organization under the law. It also had notice of the contract made with the Districts by the mortgagee, and which was to govern it in the construction work. Argument is made at great length, with citation of a number of authorities, to prove the general principle that a mortgage lien cannot, where it has *vested* before initiation of other liens, be displaced by such liens. As to the abstract principle we make no challenge, but it is not applicable here and the entire argument is predicated upon the assumption that the lien of the mortgage was valid and attached to the property as it came into existence. Cases are cited to the effect that where a mortgage lien had *vested* it can not be displaced by subsequent liens. This is foreign to the question made by the Districts which is as hereinbefore stated.

On the other branch of the case in the matter of the lien of the Portland Wood Pipe Company, one of the solicitors now representing the mortgagee upon this appeal, verified the notice of the lien, and as heretofore shown, the original bill to foreclose the lien claimed its priority over several other liens against the property, including that of the mortgagee. On this appeal, his position appears to be reversed, since the claim is now made that the mortgage lien has priority. It is said in counsel's brief that the amount to be paid material

men and other contractors was fixed without consultation with or consent of the mortgagee; that the price for which the bonds were to be sold was likewise fixed without the mortgagee's knowledge or consent. Why should the mortgagee be consulted as to any of these matters? What concern had it with the contracts made or bonds issued by the Districts? The mortgagee entered into this business with open eyes, and is charged with knowledge of the law governing the construction, operation and maintenance of property of this class.

A critical examination of the mortgage, and the contract for construction of even date therewith, discloses a careful and painstaking attempt to obtain full security for the payment of the contract price of the work, at the expense of the Districts and all creditors. The mortgage is made to cover not only all the property of the mortgagor then in existence, but all that it might thereafter acquire, and included practically the entire irrigation system, together with a vast acreage of lands which the mortgagor Company held in fee, or had equitable title to. In addition to this it obtained the personal obligations of Ford, Butterfield and McKinney as endorsers upon the note. Perhaps it was then advised that a mechanics' lien could not be charged against the property necessary to the operation and maintenance of the irrigation system of the Districts, and supposed that the mortgage would be a valid and satisfactory security. Later, disturbing doubts as to the validity of the mortgage seemed to have arisen, and three or four years after its execution the mortgagee procured certain resolutions from the Districts purporting to admit the validity of the mortgage lien. Not content with one resolution, they procured three—two on the 15th of June, 1914, and one a

month later on July 10th. In adopting this last resolution the Directors seem to have awakened to a sense of their responsibility and recite in the resolution that they understood, under a correct construction of the law, that the lands and water rights which have been conveyed to the Districts are subject to the mortgage lien, but they do not waive their rights in the event that their interpretation of the law is incorrect. We do not see that these resolutions have any force or efficacy. There was no consideration for them, and if there were a consideration we would still be confronted with the question of the power of the Districts to validate the mortgage lien. If the mortgage lien was valid in its inception and attached to the property as it came into existence, there was no necessity for admissions of its validity. If they were not valid, the declarations of the Directors that it was could not give it life. The court below very properly refused to give effect to these resolutions as admissions by the Districts.

The mortgagee, by this mortgage, attempted to secure a larger security than they would have had through a mechanics' lien, if such a lien could be charged against the property. It was only concerned in the construction work with the building of the dam. That, and that alone, was within its contract; the remainder of the construction work was to be and was performed by other contractors. The Districts have issued bonds as the law provided, pursuant to the contract, amounting, at par value thereof, to the sum of $798,123.00, and these bonds were sold in the open market and are held by persons in different parts of the country. The Districts have paid the Company the full amount of the contract price.

A MORTGAGE LIEN CANNOT BE RAISED NOR CHARGED AGAINST AN IRRIGATION SYSTEM INTENDED FOR THE PURPOSES AND USES WHICH IRRIGATION DISTRICTS ARE ORGANIZED TO ADMINISTER BECAUSE SUCH PROPERTY IS DEDICATED TO PUBLIC USES FROM THE BEGINNING OF ITS CONSTRUCTION.

The contract made by the Districts with the Company was executory, and was not only a contract of sale but of construction. The doctrine of relation applies to such a contract and the equitable title to the property to be constructed and conveyed was vested in the Districts as of the date of the contract, and the legal title vested as the conveyances were made.

It appears from the evidence that the mortgagee was the first contractor employed by the Company on the work, and performed the first construction work in completing the dam necessary for the efficiency of the reservoir. The contract of construction with the mortgagee, and the execution and delivery of the note and mortgage, were contemporaneous, and, in fact, both instruments (executed on September 29, 1911), together constitute the contract with the mortgagee. The mortgage upon its face purports to charge all the property, real, personal or mixed, which the Company then had or might thereafter acquire, and particularly describes the reservoir and the lands situated within the site, right-of-way from the Government of the United States, all canals, ditches, head-gates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used or acquired in connection with the distribution of the water from said reservoir, and for carrying and distributing the

water to the place or places of intended use, now owned or constructed, or which may hereafter be acquired or constructed by the Company, including permits issued by the State Engineer of Idaho, together with certain lands particularly described. The habendum clause includes all of the said property then owned by the Company and thereafter to be constructed or acquired by it. With the lands of the Company, excepting those underlying the site of the reservoir, we have no concern. As to them, so far as the Districts are concerned, the mortgage lien may stand, but we have concern with the lien asserted by the cross-complaint and claimed by counsel upon the whole and every part of the System for the diversion, conveying and distribution of the waters as provided by law to the owners and occupiers of lands within the boundaries of the Districts. What has been heretofore said upon the question of mechanics' liens applies with equal force to this question. The Company had no authority in law to cover with this mortgage the construction work, in whole, or in part, that it had contracted with the Districts to do and complete. It is evident that a mortgage lien upon such property would be just as effectual as a mechanics' lien in impairing if not destroying the effective usefulness of the System. The contract of the Districts with the Company did not empower it to charge the property dedicated to public uses with a mortgage lien to enable it the better to perform its contract. It could not lawfully have done so, because the district officers, as trustees, were restrained and limited by statute to the administration only, of the trusts declared by the law. They nevertheless had a

right to contract for the construction and to negotiate for the water system in advance of its total completion.

Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248-251.

But the Legislative intention clearly was and is, that payment must be made either with money or by the bonds of the Districts. It is familiar law that all persons dealing with municipal corporations (or other public officers) are charged with knowledge of the limitations upon the power of their officers.

"Since the authority of public officers can only be created by law, and is, therefore, a matter of public record, all persons dealing with them are bound to take notice of its existence and must ascertain that it is sufficient in assumed use. Their power and authority is special and limited, not general, and their right to act in a specific instance must be ascertained and determined by an inspection of the law interpreted strictly."

Abbott Municipal Corporations, Vol. 2, p. 1562;

Hughson v. Crane, 115 Cal. 404.

"A public corporation which has acquired property as a trustee for the public cannot act in such a manner as to deprive the public or its individual members of their personal or collective rights in the use of that property. The public corporation acts solely as a trustee; the community is regarded as a cestui qui trust and action inconsistent with or contrary to this relation will be regarded as illegal."

Abbott Mun. Corp., Vol. 3, Sec. 936, p. 2191.

If the Districts could not charge the System with a mortgage lien, surely the Company could not. Both the Company Mortgagor and the Mortgagee at the time of the execution of this mortgage must be held to have known that the System was to be constructed for the

uses of the Irrigation Districts, and that under the law the Company had no power to charge that property with the mortgage. Taking into consideration the circumstances accompanying the execution of the contract for construction, and the mortgage to secure payment therefor, one may assume that this scheme for security was devised for the purpose of getting something in an indirect way which the law forbade. If the mortgage lien is valid and can be foreclosed, as here attempted, against any part of the System, necessarily it follows that a sale may be had of the whole System for the purpose of satisfying the decree, since it cannot be divided.

In such case the consequences would be far reaching and irreparable. The purchaser would be vested with the title to the physical property, but since the franchises vested in the Districts to sell and distribute water could not be purchased and would not pass by the decree, he must find a market for the water without the boundaries of the Districts, and thus the scheme of a great and beneficial public utility is defeated. The Districts have no authority to pay the mortgage debt, nor to redeem from foreclosure sale, with either bonds or money, for their powers in the matter of construction and purchase have been exhausted.

But there is no authority given in the statutes relating to execution or foreclosure sales, to sell property of this class. The conception of the mortgagee as evidenced by the prayer of its cross-bill, and stated in the brief of counsel, is, that it must be sold as an entirety or whole, and without redemption, and, following the usual procedure, that the the purchaser be let into immediate possession of the irrigation works, rights and franchises sold. It may be true, that, if sold at all, it must be sold

as an entirety, because the component parts thereof cannot be separated and subjected to the lien or the decree. Consequently, a lien cannot attach to the reservoir site, canal, or rights-of-way, claimed or owned by the Company at the time of making its contract with the Districts.

> "It is the policy of the law to keep intact the property belonging to and essential to the operation of a public corporation, and hence its creditors will not be permitted to divide such property and sell a part of it."
>
> Guest v. Merion Water Co., 142 Pa. St. 610, 21 Atl. 1001.

The rule has been applied in cases of railroads (where the statute did not expressly authorize the attaching of liens to specific parts of the system), and manifestly the irrigation system of the Districts cannot be segregated for the purposes of the sale.

The general rule is that property of this character is not subject to execution sale.

> "The property of public corporations acquired by them for public purposes and in their capacity as governmental agents is held in trust for the public for the uses and purposes for which acquired. This trust property cannot be reached by process and sold to satisfy their debts no more than can other trust property be sold to satisfy the individual debts of any other trustee. A judgment, therefore, in the absence of express statutory provisions against a public corporation, cannot be enforced by execution, neither is it a lien upon any of its property."
>
> Abbott Mun. Corps., Vol. 3, p. 2575.

It is true that the lien of mortgage is by the decree only charged upon the unconveyed interest of the Company in the system, but a lien of the Portland Wood Pipe Company is charged upon the entire interest of the Dis-

tricts as a first lien, and as a second lien upon the interest of the Company, and a sale is directed of the entire system.

All of the proceedings in connection with this mortgage seem to indicate a scheme from the beginning to in some way charge or encumber the Districts with a debt for which they were not liable. They had no dealings with the mortgagee and their contracts began and ended with the contracts with the Company, of which the mortgagee had notice. They agreed to pay for the construction and conveyance of the System in bonds at the par value of $515,000.00. They have performed that part of the contract. There was no part of the System in existence at the time the mortgage was made, except as hereinbefore stated, a reservoir site for which an immense dam had to be constructed in order to make it available, and the ditch known as the Sunnyside Canal, together with certain permits and rights-of-way. This property confessedly was in the ownership or possession of the Company at the time the contract with the mortgagee was executed, and the mortgage given, and by that contract was dedicated to public uses. No consideration passed to the Districts for the mortgage. As to them, the Company was an original contractor as well as a vendor, and, as before stated, the price of construction and purchase has been fully paid. By that contract each of the districts acquired a "real" right, a right of property in the entire System which, at first, lacking a legal title, and therefore equitable only, is none the less the real beneficial ownership. Such property in the case of private persons descends to heirs, or passes by will, and is liable to dower.

Pom. Eq., 1st Ed., Sec. 106, pp. 87-88.

The Company contracted to construct and convey this property, which, from the initial step in the construction, became impressed with a public trust. In so far as the reserved interests of the Company were connected with the irrigation system of the Districts, they were, by the Company dedicated to public uses, and cannot be charged with liens nor subjected to public sale.

THE DOCTRINE OF RELATION IS APPLICABLE HERE, AND THE EQUITABLE TITLE TO THE PROPERTY TO BE CONSTRUCTED VESTED IN THE DISTRICTS UPON THE MAKING OF THE EXECUTORY CONTRACT OF SALE AND CONSTRUCTION.

By the contract made between the appellants and the Company, the equitable title to the property *in esse* and the title to the property as it was constructed and came into being, vested in appellants. Applying the doctrine of relation, the Company was but a trustee for the appellants, and the appellants were trustees for the Company of the purchase price—either money or bonds. The doctrine of relation is based upon the maxim—

> "Equity looks upon things agreed to be done as actually performed."

It is a legal fiction, "by which in the interest of justice a legal title is held to relate back to the *initiatory step* for the acquisition of the land." (The italics are ours.) (U. S. vs. Anderson, 194 U. S. 394-399; Peyton vs. Desmond, C. C. A. 129 Fed. 1-11; Gibson vs. Chouteau, 13 Wall. 92-100; Krakow vs. Wille, 125 Wis. 254, 103 N. W. 121.)

An executory contract for the sale of land vests

equitable ownership of the property in the purchaser, and in such cases the seller retains the legal title as security for the deferred installments of the purchase price.

> "The vendor is, in equity, immediately deemed a trustee for the vendee of the real estate; and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances the vendee is treated as the owner of the land, and it is devisable and descendible as is real estate. On the other hand, the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personality, and is distributed in the same manner on his death."
>
> Story's Equity Jurisprudence, Vol. 2, Sec. 1212;
>
> 1st Sugden, Vend., C. 5, Sec. 1;
>
> Dunne vs. Yakich, 10 Okla. 388; 61 Pac. 926.

Necessarily the application of the doctrine of relation to such contract must give effect to the conveyance, or other act stipulated for in the contract, as of the time the contract was made, otherwise it would be of no force or efficacy as against other conveyances. As said by Mr. Justice Miller in delivering the judgment of the court in Gunton vs. Carroll:

> "In view of a court of equity, a contract for the sale of land is treated, says Justice Story, for most purposes, precisely as if it had been *specifically performed*. The vendee is treated as the owner of the money. The vendor is deemed, in equity, to stand seized of the land for the benefit of the purchaser, and the trust attaches to the land so as to bind the heir of the vendor." (101 U. S. 431.) (Italics ours.)
>
> "The doctrine is well settled that when the vendor, after entering into a contract of sale, conveys the land to a third person, who has knowledge or notice of the prior agreement, such grantee takes the land impressed with the trust in favor

> of the original vendee, and can be compelled at the suit of the vendee to specifically perform the agreement by conveying the land in the same manner and to the same extent as the vendee would have been liable to do had he not transferred the legal title."
>
> Ross vs. Parks, 93 Ala. 153, 11 L. R. A. 148.

"Where a contract is made to convey real property or interest thereof and afterwards a conveyance is executed and delivered pursuant to the contract, the deed 'relates back to the contract,' or in other words, the title is considered as having vested in the grantee not merely from the date of the actual conveyance, but from the time when the contract was made."

Am. & Eng. Enc. Laws, 2d Ed. 275;
Thompson v. Spencer, 50 Cal. 532.

In an early case in Pennsylvania where the owners of a farm had, without a conveyance, dedicated a part of it to charitable purposes, that is, for the erection of a school house, and afterwards conveyed the entire farm to a third person, who repudiated the trust, it was held that he had become a trustee, etc., the point ruled upon is stated in the syllabus as follows:

> "If land previously appropriated by the owner to a charitable purpose, without a conveyance, be subsequently, by mistake, conveyed to another, the grantee thereby becomes a trustee for those who were beneficially interested in the charity."
>
> School Directors vs. Dunkleberger, 6 Pa. (Barr.) 9.

The contract with the company provided for the conveyance to the districts from time to time, *of the property as it was brought into existence,* and finally for a conveyance of the whole. These conveyances were conditioned upon the payment of specific sums as represented

by bonds of the Districts. The bonds were not delivered and the conveyances were not made at the times specified, for the reason, as given by Coulter in his evidence, that there was difficulty in finding a market for the bonds, and they were not called for by the Company. The issue and delivery of the bonds by the District and the conveyances by the Company of interests in the System from time to time, according to the estimates of construction work done, were matters with which the parties to the contract alone were concerned.

The equitable title to this System vested in the Districts at and from the date of the contracts of sale and construction, and the legal title vested as the property was conveyed from time to time. The doctrine of relation necessarily must affirm the interest and right of the Districts as of the date of the contract, otherwise there would be no protection for purchasers under like circumstances. The principle is illustrated in a leading case in Washington involving rights under an option contract for the sale and purchase of land, with a time limit of two years, brought to quiet title by the purchaser. It appeared that the vendor before the expiration of the two years, but after the payment of the entire purchase price, executed and delivered to a third person, with notice, a quit claim deed of the land. Thereafter, and within the time limit, the vendor deeded the land to the purchaser in pursuance of the option contract. It was held that the prior contract gave an interest in the land which bound the grantee in the quit claim deed, even though the purchase money had not been paid at the time he acquired the deed, and that upon receiving the deed

within the life of the option contract, the title thus conveyed related back to the date of the option.

Crowley vs. Byrne, 71 Wash. 444; 129 Pac. 113, 115;

People's Street Railway Co. vs. Spencer, 156 Pa. 85; 27 Atl. 113.

(It will be noted that in option contracts time is of the essence of the contract, and acceptance or performance necessarily must be within the time prescribed.)

So in Kentucky it has been held that a conveyance to a vendee in possession under a verbal contract relates back to the time when the contract was made, and prevails over a conveyance to a third party made subsequent to the verbal contract.

Allison's Executrix vs. Russell, 9 Ken. Law Rep. 198;

Reid vs. Pryse, 7 Ky. Law Rep. 526.

So a bond to convey realty, though insufficient to pass legal title, gives to the holder an equitable right superior to a claim of title by a subsequent purchaser or creditor of the vendor with notice.

McGuire vs. Whitt, 80 S. W. 474; 25 Ky. Law Rep. 2275.

In the brief of counsel it is asserted that,

"The payment from the Irrigation Districts to Crane Creek Irrigation Company were made contrary to law and no rights can be claimed thereunder."

In this connection counsel claim to have made the discovery that the contracts made by and between the Company and the Districts were in violation of law and void, and therefore the doctrine of relation could not rest upon them. It is not perceived that this question concerns the mortgagee. No issue is made as to this in the pleadings

or in the evidence and the State and bond holders, who are directly interested with the Districts, are not parties to this litigation. If the contract made by the Company with the Districts was illegal and void the mortgagee is in no position to challenge it since the contract made by it on September 29, A. D. 1911, with the Company was made as a sub-contractor for the special purpose of performing the work contracted with the Districts to be performed by the Company. This last contract is referred to in the mortgage. (Trans. 37.)

If this contract was void and the Company had no rights under it, surely the mortgagee had no business to enter into a contract to aid the Company in carrying out the provisions of the illegal contract. The argument of counsel here seems to be inconsistent with the theory upon which they ask the court to adjudge the lien of the mortgage as binding upon the entire property. Such contention can only be maintained upon the theory that the contracts of October 22, A. D. 1910, between the Company and the Districts were valid and binding obligations. Parts of the Idaho Revised Codes are cited to sustain counsel's contention, but a subsequent statute authorizing the payment for construction works with bonds is not mentioned.

By Act approved March 12, A. D. 1913, an additional section is added to the code as section 2404 A, as follows, to-wit:

> "Sec. 2404 A. In lieu of the sale of bonds as provided in Section 2404, and the payment for construction work in cash, as provided in Section 2416 of this Title, bonds authorized by the vote of the District for the purpose of acquiring or constructing irrigation works may be issued and delivered by the Board of Directors directly to

> the contractor in payment for such construction work, and the term construction work as herein used, shall be deemed to include the erection and construction of pump houses and electrical and other pumps or appliances for raising water on to the lands, as well as dams, headgates, ditches, laterals and other irrigation works. There may be included in any contract for construction, maintenance, interest and power, charges for such period as the Directors and the contractor may agree, not to exceed three (3) years, and when so included, interest, electrical, or other power and maintenance charges for the term agreed upon may be paid in bonds of the District to the amount agreed upon."
>
> Session Laws 1913, p. 542.

This Act did not take effect until sixty days after its approval, and within that time 151,000 of these bonds were delivered to the Company, but the remainder of the bonds were delivered after the expiration of the sixty days, when the statute took effect. The mortgagee has not been injured in the matter of issuing and delivering of bonds of the Districts. It made no contract in relation to the bonds and their validity are not in issue here, and this court cannot pass upon the question upon this appeal.

It is further contended that, "*The Districts are estopped to deny the validity of the lien of appellants' mortgage on their interest in the system.*" To establish this contention it is claimed that the resolutions hereinbefore referred to were adopted by the Districts in the expectation that they would gain time and avoid an impending failure and thereby lull the mortgagee into a sense of security. Before an equitable estoppel can be recognized it must be clearly shown that the party asserting the estoppel relied upon the representations and acts of

the other party and because of such reliance suffered injury. It is not shown in the evidence that the mortgagee relied upon the statements in the resolutions and was induced to do something or refrain from doing something for its benefit, and thereby suffered a loss or injury. There is no direct evidence that the foreclosure was delayed by reason of the resolutions, and at most the fact only appears inferentially. We again call attention to the declaration made in the last resolution by the Directors of both Districts of July 10, 1914, expressly stating that the Districts did not waive any rights in the premises and that in the event of their interpretation of the law being incorrect, it was not their intention to waive or relinquish any right which they migth have in the premises. (Trans. 153.) Moreover, delay alone in bringing the foreclosure suit cannot be held to be an injury sufficient upon which to ground an equitable estoppel in this case, since if the mortgage lien is valid and enforceable against the property, a delay, protracted or otherwise, would not affect the security, and the interest upon the debt is a sufficient compensation.

Counsel argues the question of equitable estoppel here as if the Districts were individuals or private corporations, ignoring the distinctions made in the cases cited. It is the exception and not the rule to permit an estoppel to be enforced against municipal corporations in relation to public property, or where the corporations represent public rights and interests.

In the case of Boise City v. Wilkinson (16 Ida. 150, 120 Pac. 169), cited by counsel, the city brought an action in ejectment against an occupant of a portion of the street which had been deeded to the original occupant by the Mayor thirty-eight years before the action was

brought, and had been occupied during that period by persons who had placed permanent and valuable improvements upon it. The court, while admitting the general rule, said there were special and peculiar cases in which such a corporation will be estopped to assert a stale, legal and inequitable claim. As said by Judge Ailshie in a concurring opinion, the court had no intention of departing from the rule laid down in 14 Ida. 282, 94 Pac. 170, wherein it is said: "Neither the city officers, nor any other public officer, would have any power to defeat the right of the public in property thus dedicated to public uses."

In Portland v. Inman-Poulson Co. (Ore.), 133 Pac. 829, it appeared that the city, by its officers, had *induced* defendants to purchase certain property, which they did, and expended three-fourths of a million dollars in the erection of the largest saw mill in the world on the property. Whereas afterwards the city asserted a right to open streets through the property, *but there was no public necessity for the streets* the city purposed to open, and the court held it was estopped under the special circumstances of the case from proceeding.

In Hubbell v. City, 64 Kans. 645, 68 Pac. 52, the court said that "a city in the exercise of its quasi private or corporate powers is governed by the same rules and is liable to the same extent as private corporations." There, the city, by promises and misrepresentations of its officers, induced one holding its warrants to permit them to remain uncollected until the cause of action on the debt was barred, and it was held that the city was estopped to deny the validity of the warrants, etc. Clearly these cases lend no support to the claim of an equitable estoppel made here.

In conclusion, counsel asks this court to reverse the judgment of the district court in the matter of the allowances of attorneys' fees, and to substitute the judgment of this court for that of the court below. As to this, we submit that the district judge was not bound by the estimates of value of services of counsel given in the testimony of Judge Hawley. The matter is at large in the discretion of the trial judge who is not bound by the evidence of witnesses, but may and should determine the matter of counsel fees aided by his own knowledge of the case and the services performed, considering and giving effect to the evidence in the light of all the facts and conditions.

It is further insisted that the cross-appeals herein are frivolous, and that the cross-complainants should be penalized for consuming the time of court and counsel with matters relating to the cross-appeals, etc. In any event it is said that they should be required to pay at least a part of the expense of printing the record on appeal. It is said that the Districts do not have an appealable interest in that part of the decree charging the mortgage lien upon the interest of the Company. Since the decree charges an interest in the property which is dedicated to public uses with the lien and directs a sale of that interest which will deprive the Company of right and power to complete its contracts with the Districts, it is patent that the Districts have an appealable interest.

In conclusion, we submit, that the Company in making the mortgage perpetrated a fraud upon the Districts, in violation of its contracts; that the lien of the mortgage did not attach to any portion of the irrigation system, and, that the decree of the court below should be re-

versed with directions that a decree be entered denying a foreclosure of the mortgage given by the Crane Creek Irrigation Land & Power Company to appellants against any portion of the Irrigation Systems of appellants and cross-appellants, and finally dismissing the cross-bill of appellants as against appellees and cross-appellants.

Respectfully submitted,

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Residence, Salt Lake City, Utah.

E. R. COULTER,
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No. 2644

United States
Circuit Court of Appeals
For the Ninth Circuit.

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), Appellants,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROS. CONSTRUCTION COMPANY, Limited, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD and R. C. McKINNEY, Appellees,

CRANE CREEK IRRIGATION DISTRICT and SUNNYSIDE IRRIGATION DISTRICT, Cross-Appellants,

vs.

MANEY BROTHERS & CO. (a co-partnership consisting of J. W. Maney, John Maney, Herbert G. Wells and E. J. Wells), Cross-Appellees.

Petition for Rehearing

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

RICHARDS & HAGA and
McKEEN F. MORROW,
Solicitors for Petitioners and Appellants,
Residence: Boise, Idaho.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 33834

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Cross-Appellants,

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vs.

MANEY BROS. & CO., etc., Cross-Appellees.

Petition for Rehearing

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

To the Honorable The United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioners, Maney Bros. & Co., appellants in the above entitled cause, respectfully petition this Honorable Court to grant a rehearing in said cause

and your petitioners especially claim error in the decision filed herein in the following particulars:

1. The decision appears to stand without supporting authority and seems to be in direct conflict with other decisions of this Court and with all the authorities on the subject that we have been able to find. The Court erroneously assumed that appellants' mortgage imposed a burden upon the Crane Creek Irrigation Project which the buyer could not remove without departing from the contract of sale and we think it erroneously concluded that, such being the case, the purchaser could consort with the seller to defeat the mortgage by paying the purchase price to the seller in total disregard of the rights and equities of the mortgagee; whereas, under the authorities, if the mortgage exceeds the purchase price, the buyer may pay the purchase price to the mortgagee and compel specific performance of the contract of sale and release of the mortgage. In other words, the buyer has the aid of the Court for the enforcement of the contract of sale according to its terms, but that does not mean that he may wholly ignore the rights of the mortgagee and join with the seller to cheat him out of his security, his duties in this regard being no different where the mortgage exceeds the purchase price than where it is less. The decision in effect places the stamp of approval on practices and courses of dealing seemingly contrary alike to law, equity and sound business morals.

2. This Court erroneously assumed that the mortgage of appellants could not be satisfied or paid

through the medium of the bonds of the appellees, Crane Creek and Sunnyside Irrigation Districts when in fact the districts had the right to deposit their bonds to the par value of $75,000 and $50,000, respectively, obtain a release from the mortgage and require appellee, Crane Creek Irrigation Land and Power Co., to credit them with that amount on their contract of purchase, and it was their duty to make this deposit if they wished to free the project from the lien of appellants' mortgage.

3. This Court erroneously assumed that the bonds, provisions for the deposit of which to satisfy appellants' mortgage was made in paragraphs 1 and 2 of the covenants of said mortgage, were in addition to the purchase price of the project instead of being a part of such purchase price.

4. This Court erred in not holding in accordance with its decision in Crane Creek Irrigation District and Sunnyside Irrigation District vs. Portland Wood Pipe Co. et al., No. 2645, that the lien of appellants' mortgage attached to the irrigation system before the districts acquired it, and such lien being valid and subsisting, was not displaced or discharged by the attempted conveyances to the districts but remained as fully effective after such conveyances as before.

5. That the Court erred in not applying the same reasoning to appellants' mortgage that it did to the lien of appellee, Portland Wood Pipe Co., in Cause No. 2645.

6. That the Court erred in not holding that the districts were estopped by their resolutions recognizing the validity of the lien of appellants' mortgage to afterwards deny its validity or defend against its foreclosure.

7. That the Court erred in declining to pass upon the legality of the contracts of August 22, 1910, or the manner in which they were performed on the ground that conveyances pursuant to such contracts had been made, and appellants could not object, for the reason that if such contracts were illegal or were illegally executed, no rights could be based on them and the actual conveyances to the districts were made long after appellants' mortgage and any rights acquired under such conveyances were subject to those of appellants.

8. That the Court erred in not considering the fact that between the execution of the contract of August 22, 1910, and the first conveyance to the districts in the spring of 1913, without any notice to appellants and apparently subsequent to their mortgage, the interests of the irrigation districts in the project were increased from 57% to practically 70%, and appellants were at least entitled to a lien on this 13% interest conveyed to the districts in addition to that provided for in the original contract.

Your petitioners herein seek to show that the Court, while apparently conceding the contentions urged by them in their brief and at the argument of the cause, has placed its decision on grounds that

are wholly untenable, and that such decision is in direct conflict with the decision in the companion case of the Crane Creek Irrigation District et al., vs. Portland Wood Pipe Co. et al., No. 2645, which was decided by this Court against the contention of the Irrigation Districts.

ARGUMENT.

In its decision herein, this Court has abandoned the theory of relation advanced by the trial court, and in view of the number and the clearness of the authorities cited on this point in appellants' brief, this basis for the trial court's decision does not seem maintainable. This Court also very properly disregards the wholly impossible position urged by appellees Crane Creek and Sunnyside Irrigation Districts that the property of an irrigation district is not subject to mechanics' liens or mortgages, and therefore property acquired by such corporations is *ipso facto* divested of any liens that may have attached to it before such acquisition.

This Court's decision concedes that a vendor under an executory contract of sale may mortgage his interest but holds that he may not impose burdens on the property which cannot be removed by the purchaser without departing from the contract of purchase, and that here, as the districts were to pay for the system in bonds while appellants' mortgage was to be paid in money, the mortgage was an additional burden imposed on the districts. But this holding, which is the gist of the decision and upon which it

must stand or fall, entirely overlooks the fact that the mortgage was given by the Crane Creek Irrigation Land and Power Co. in payment for the construction of a part of the system that Company had agreed to convey by the contracts of August 22, 1910. It asserts that the mortgage could not be discharged or satisfied by a tender of Irrigation District bonds and dismisses the provisions of the mortgage for the release of the districts on the deposit with the trustee therein named of the sum of $75,000 par value bonds of the Sunnyside District and $50,000 par value of the bonds of the Crane Creek District with the airy assertion that "these were burdens which the parties to the mortgage could not lawfully impose on the Irrigation Districts".

The fundamental error in this holding is the baseless assumption that this $125,000 par value of District bonds was in addition to the purchase price of the project to be paid by the Districts to the Crane Creek Company, whereas these bonds were necessarily a part of such purchase price. The mortgage was given for construction work and the Crane Creek Company, which was to receive District bonds for the system constructed and conveyed by it, including the reservoir constructed by appellants, agreed with the contractor that the deposit of a certain amount of these same bonds with a trustee should entitle the Districts to a release from the mortgage. The only bonds of these Districts which the Crane Creek Company could have to deposit were the bonds received for the purchase price of the system, and they were

the only bonds issued or authorized to be issued by the Districts, and hence these bonds were necessarily a part of the purchase price.

These provisions for the deposit of bonds laid no additional burden whatever upon the Districts, because they were in a position to insist that bonds to the par value of $125,000 should be placed in the hands of the trustee for the purpose of releasing this mortgage upon their interest in the system, and that this amount be credited to them on the purchase price of the project. Instead of doing this, they chose to deliver the bonds unconditionally to the Crane Creek Company, notwithstanding the fact that they had full knowledge of appellants' mortgage and the provisions therein for the deposit of these bonds. These provisions are as follows (trans. pp. 37-38):

"1. The mortgagor shall have the right to carry out its contract with what is known as the Sunnyside Irrigation District, which contract bears date of August 22, 1910. *But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Sunnyside Irrigation District, until there has been deposited,* as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as Trustee, *Seventy-five Thousand Dollars* ($75,000) *par value of the legally issued bonds of said irrigation district,* the legality of which said bonds shall first have been approved by the Supreme Court of

the State of Idaho. *But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Sunnyside Irrigation District.*

"2. The mortgagor shall likewise have the right to carry out its contract with what is known as the Crane Creek Irrigation District, which contract bears date of August 22, 1910. But the mortgagees shall not be required to release the lien of this indenture on any of the property herein described, or upon the property to be conveyed under said contract by the mortgagor to said Crane Creek Irrigation District, until there has been deposited, as additional security for the indebtedness secured hereby, with F. F. Johnson, Cashier of the Boise City National Bank, of Boise, Idaho, as Trustee, Fifty Thousand Dollars ($50,000) par value, of the legally issued bonds of said Irrigation District, the legality of which said bonds shall have first been approved by the Supreme Court of the State of Idaho. *But upon such bonds being delivered the mortgagees agree to fully release from the lien of this indenture the interest to be conveyed by the mortgagor under its said contract to said Crane Creek Irrigation District.*" (Our italics.)

Appellants' mortgage was recorded in Washington County, Idaho, where the property is situated, on October 6, 1911 (paragraph 7 of appellees' answers, pp. 63, 78), a year and a half before any bonds were delivered to the Crane Creek Company, and both dis-

tricts had actual notice of the mortgage and its terms from the date of its execution (see testimony of Mr. Ford, tr. p. 166; testimony of Mr. Coulter, tr. pp. 159, 160).

The first delivery of bonds was made about April 30, 1913, amounting to $151,000 par value of Sunnyside District bonds and $99,000 par value of Crane Creek District bonds. Thereafter bonds were delivered from time to time on account of the construction of the system in accordance with estimates as appears from Mr. Coulter's testimony to the amount of $386,800 par value of Sunnyside bonds and $188,500 par value of the Crane Creek bonds. All of these bonds were delivered unconditionally to the Crane Creek Company in total disregard of the rights of the appellants and without any attempt to obtain a release from appellants' mortgage of the property being conveyed to the Districts.

There was certainly nothing in the provisions of the mortgage above set out that could be construed to impose an additional burden on the Districts, and if by utterly disregarding these plain provisions of which they had full notice, the Districts have acquired this property subject to liens, they only are to blame. The Crane Creek Irrigation Land and Power Company had contracted to construct the system and convey it to the Districts free from liens, and it was their plain duty to see that the company performed its contract. The Crane Creek Company did not do the construction work directly. It contracted for the reservoir system with appellants and

gave this mortgage in payment for the work done by them. It contracted for the distribution system with appellee, Slick Bros. Construction Company, and agreed to pay such appellee in money, and appellee Portland Wood Pipe Company furnished material on a contract with Slick Bros. Construction Company which also called for payment in money.

Appellants' claim, the claim of the Pipe Company and the other sub-contractors and materialmen were all for construction work, and it was the duty of the Districts in each case to see that the proceeds of the bonds turned over by them to the Crane Creek Company were paid to the contractor, sub-contractors and materialmen. Appellees, Slick Bros. Construction Co. and Portland Wood Pipe Co., had not agreed to accept bonds and hence the Districts had to see that they were paid out of the purchase price. The record in Cause No. 2645, Crane Creek Irrigation District and Sunnyside Irrigation District vs. Portland Wood Pipe Co., the companion case to the present one, shows that the Districts failed to see that the Pipe Company was paid, that it filed its lien and brought suit to foreclose, and both the learned District Judge and this Court have very properly held that the Districts acquired this property subject to the lien of the Pipe Company and that the price of its work being a part of the construction did not impose an additional burden on the Districts. But the Pipe Company had to be paid in money and the Districts had to rely on the Crane Creek Company's selling bonds to raise this money and discharging

the lien, while this was not the case as to appellants' mortgage, for appellants had bound themselves to accept bonds in satisfaction of their mortgage on the property constructed for and to be conveyed to the Districts.

All that the Districts had to do to secure this release was to deposit bonds to the par value of $125,000, which it appears from the record were of the market value of about $75,000 in the spring and summer of 1913 (tr. pp. 136-150) and charge the Crane Creek Company with a payment of $125,000 on account of the purchase price. They would thus have released their interests in the system from a $90,000 mortgage for the equivalent of $75,000 in money. Why was it not done? The record fails to explain. If the failure to pay for the material furnished by the Pipe Company in money leaves the Districts subject to a valid lien for such material, why does not the failure to deposit bonds for the release of appellants' mortgage leave the Districts equally subject to a lien? No adequate answer is found in the opinion herein, and we think the same rule must of necessity be applied in either case.

In fact it seems to us that appellants' case is conceded when this Court says that the vendor under an executory contract of sale holds the legal title as security for the purchase price, and the title so held may be conveyed or mortgaged. This principle is fully established by the authorities cited at pp. 41 to 58 of appellants' brief herein and need not be elabor-

ated upon, as those authorities are approved by this Court. But the interest of the vendor is strictly limited by this doctrine and a purchaser or encumbrancer of the vendor's interest takes only what he had to convey and that is his lien for the unpaid purchase price, whether it be in money or securities, or what not. The grantee of the vendor acquires only the vendor's interest and the purchaser can compel the grantee to convey to him on precisely the same terms as he could compel the original vendor, but he cannot disregard the rights of such grantee. Where the balance due on the contract is tendered to the grantee or encumbrancer from the original vendor, and he claims something more, it may well be said that the vendor cannot impair or restrict the rights of the purchaser or impose burdens upon his interest, but where the purchaser wilfully disregards the rights of the grantee or encumbrancer and pays the purchase price to the original vendor, it only causes confusion to say that additional burdens have been imposed. In such cases, it is the act of the purchaser in wilfully and wrongfully paying the original vendor who has transferred his interest and right to payment that imposes the burden.

If a vendor of property under such a contract grants his interest outright, the consideration, whether more or less than the unpaid price, is entirely immaterial to the purchaser. In either case, the original purchaser may get the property on payment of the balance due on his contract to such

grantee, whether that balance be more or less than the grantee paid, and the purchaser is not legally entitled to the property on any other terms. Where the vendor's interest has been mortgaged, the mortgagee, of course, is only entitled to the payment of his debt, and if the debt is less than the balance, then, of course, the remainder would go to the vendor; but if it is mortgaged for more than the balance due, the mortgagee cannot acquire any greater interest than his vendor had and so must release his mortgage on payment of the balance of the purchase price.

To illustrate: If A contracts to sell land to B for $10,000 and later conveys or mortgages the same property to C for $15,000, no additional burden is placed upon B. He can pay C the $10,000 and compel him to convey if he is a grantee, or to release his mortgage if he is a mortgagee because C stands in A's shoes and takes subject to B's equity. C only acquired what A had, and that was the legal title as security for the payment of $10,000, and when the $10,000 is paid to C, he must convey; or, if he has a mortgage, must release it. There is one thing, however, that B cannot do under such circumstances; he cannot pay A the $10,000 after notice of C's rights and take the property free from all claims of C. If he attempts to do so, he may have to pay for the property twice, not because C paid $5,000 more for A's interest than B owed upon it, but because B has disregarded C's right to have the payment of $10,000 made to him.

On this point, see Lamm vs. Armstrong, 95 Minn. 434, 111 Am. St. Rep. 479; Southern Bldg. etc. Assn. vs. Page, 46 W. Va. 302, 33 S. E. 336; Mutual Aid Society vs. Gashe, 56 O. St. 273, 46 N. E. 985; Ten Eick vs. Simpson, 1 Sandf. Ch. (N. Y.) 244; Laughlin vs. Northwestern Lbr. Co., 176 Fed. 772, 193 Fed. 367. In the case last cited it was said: "*In case of a transfer the vendor has no right to receive the money if the vendee knows of the conveyance. If he pays the vendor, he may have to pay again.*" These cases are discussed fully in appellants' brief, and other authorities are also cited.

In this connection it should be noted that all the bond deliveries by the Districts were made to the Crane Creek Company absolutely and without qualification and were in total disregard of the rights of appellants under their mortgage or of any claims or liens of materialmen or sub-contractors on the project (see testimony of Mr. Coulter, tr. pp. 160 to 164), and the Irrigation Districts had taken an indemnity bond for $100,000 with the Aetna Accident and Liability Co. as surety for the faithful performance of the contracts of August 22, 1910, including the turning over of this property free from liens. (See paragraph XXVII of Exhibit B, tr. p. 119; exhibit T, p. 122; exhibit S, p. 134; exhibit R, p. 138; testimony of Mr. Coulter, p. 161.) The action of the Districts in obtaining this bond shows clearly that they recognized the possibility of liens on the project, and their action in paying over their own bonds without any attempt to protect themselves

shows that they were apparently relying on this indemnity bond as full protection. The decision, however, renders the surety bond useless and serves to protect the surety as well as the parties who wilfully chose to disregard the mortgage.

The only authority cited by this Court in deciding the present case is the case of Voss vs. Waterloo Water Co., 163 Ind. 69, 66 L. R. A. 95, but it in no way passes upon any feature involved in the present case and certainly cannot be said to sustain the decision. There a city was indebted up to its constitutional limit, and it was held that the purchase from a water company of a plant subject to a bonded indebtedness of $20,000 would in effect increase the debt of the city by that amount and the carrying out of such contract was therefore enjoined. The contract itself contemplated an additional indebtedness, but here the bonds of the Districts had been voted and issued and appellants' mortgage could have been paid in bonds and the amount credited on the purchase price of the project, and it was the failure of the District officers to have these bonds deposited as provided in the mortgage that saddled the Districts with the property, subject to a lien which was valid and subsisting when they acquired it. Under these circumstances, neither the Districts nor their officers should now be allowed to urge their own neglect of duty in discharging this lien.

The decision of this Court in the Portland Wood Pipe Co. case, No. 2645, referred to above, shows clearly that the mere conveyance to the Districts does

not discharge liens already in existence, and that case is both controlling and conclusive and should be followed here. No distinction is drawn or attempted to be drawn between the two cases in the briefs, or in either of the opinions of the Court, and apparently the conflict between them has escaped the Court's attention. A reference to the brief of counsel for the Districts in this case shows that they contended their property was not subject to appellants' mortgage because it would not be subject to mechanics' liens, and they relied on the same reasoning and authorities to support their position in regard to appellants' mortgage that they relied upon in regard to the Pipe Company's lien. The only question in the Pipe Company case, as stated by this Court in its opinion, was whether the mechanics' lien having arisen as against the Crane Creek Company prior to the conveyances to the Districts, the property of the Districts could be held subject to a mechanics' lien, and this Court decided this question in the affirmative, a decision which is undoubtedly sound in principle and sustained by the authorities.

The case of Salem vs. Lane & Bodley Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep., 481, quoted at length and with approval by this Court in the Pipe Company case, is the exact counterpart of that case and seems to be a decisive authority both as to the lien of the Pipe Company and the mortgage of appellants. In that case Reed & Co. contracted to furnish the city with an electric light plant to be paid for in bonds of the city or partly in bonds and the

balance in notes at the city's option. This plant was to be conveyed free and clear of incumbrances. It was erected on land purchased for Reed & Co. by one Marshall, who financed their construction. The Lane & Bodley Co., sometime after the contract between the city and Reed & Co., installed an engine in the plant under contract with Reed & Co., and the city council had notice of such installation and the amount due for it; thereafter Marshall conveyed the land to Reed & Co. and they tendered the plant to the city and after inspection it was accepted and conveyed to the city; and the city elected to issue and deliver its bonds to Reed & Co. for the full purchase price. The transaction was entirely executed but Lane & Bodley were not paid and they thereupon brought suit to foreclose their lien. In upholding this lien, the Court said:

> "The decree was not awarded on the theory the property thus held by the municipality for the use of the public—to enable the city to discharge its public functions—is within the purview of the mechanics' lien law and subject to be sold to discharge an indebtedness contracted by the city for material or labor used in the construction of the plant, but that the lien attached to the electric light plant before it became the property of the city, for the debt of the then owners, T. C. Reed and William Van Kirk, and that the city acquired the property subject to the lien. Reed and Van Kirk were parties defendant to the bill, and a personal money decree was entered against them and a decree *in rem* against the electric light plant. The decree was prosecuted

on behalf of the city only. *If the defendant in error corporation had perfected a lien against the plant while it was the property of an individual owner, the subsequent purchase of the plant by the city could not operate to deprive the lienor of the benefit of the statutory provisions for the enforcement of the lien by a forced sale of the property.* The decree is a personal money decree against Reed and Van Kirk, and for the sale of the electric light plant in default of payment of the decree debt. There is no decree against the city for the payment of any sum. The city cannot be required, by mandamus or any order or process of the Court, to pay the decree debt. It is not a decree debtor, but the owner of real property upon which the lien of the decree may operate if it does not pay the sum specified in the decree. It may voluntarily pay the amount necessary to remove the lien from the property, but there is no process or authority of law that may be invoked to coerce it to make payment. The lien is created by the statute, and the statute provides, as the mode of enforcement of the lien, the sale of the land on which the lien has attached. To deny to the plaintiff in error corporation the benefit of this mode of enforcing the decree is, in this case, to nullify the lien."

Then, after reviewing the facts, the Court continued:

"Reed, of the firm of Reed & Co., and for the firm, afterward acquired the legal title by deed from Marshall, and the lien attached also to the fee title thus acquired by Reed. Reed subsequently conveyed to the city, but the lien was in

no wise impaired by this change of ownership. *The city acquired no greater or better title than its grantor had. Nor did the transfer of the title to the city, as we have before seen, divest the defendant in error company of the lien in its favor, which attached to and encumbered the lands in the hands of Reed.* There was some testimony to prove the city contracted for the land from Wilson, but by far the greater weight of the proof is adverse to this position. The contract between the city and Reed & Co. did not contemplate the city should be entitled to receive the title to the premises on which the plant was to be built until it had accepted and paid for the plant. If it elected to pay in bonds of the city, the contract provided Reed & Co. should convey the property to the city on delivery of the bonds; but if the city should elect to pay for the plant in part in six notes, due, respectively, in one, two, three, four, five and six years, the contract expressly provided that Reed & Co. should convey to the city only 'when all of said notes, and interest thereon, are fully paid'. The city advanced no money to pay for the land, and an affirmative act of acceptance of the plant and payment thereof, as before mentioned, were prerequisites to the right of the city to demand any right or title to the premises. The substance of the entire transaction was, that Reed & Co. proffered to procure, construct and tender to the city a complete electric light plant (grounds, building and machinery), constructed in accordance with given specifications and plans, for a specified sum of money, and the city contracted to accept the said plant (grounds, building and machinery) if constructed and tendered

> in accordance with the terms of the proposition of said Reed & Co., and under the contract Reed & Co. tendered, and the city accepted, a plant which was encumbered by a legally subsisting lien in favor of the defendant in error company. *Such a lien would not be displaced by the conveyance to the city, but the lien remained as fully effective against the property after the conveyance to the city as before.*" (Our italics.)

In the case just quoted from, as in the Pipe Company case and the case at bar, the indebtedness was incurred by the vendor of the property under an executory contract of sale for the construction of that which he had agreed to convey. In all of them the vendor was to be paid in bonds of the municipal corporation buying the property, but only in the present case could the indebtedness and lien of the contractor be paid off in such bonds. In the Lane-Bodley case and in the Pipe Company case the contractor was entitled to payment in money. In all of these cases the property was constructed by the contractor and was subject to the mechanics' lien or the mortgage when the conveyances were made to the municipal corporation, and in all of them that corporation had notice of the claim. In none of the cases was a decree sought against the municipal corporation, but only against the property, so that the indebtedness was in each case a claim against the property only and not generally against the corporation. Notwithstanding the fact, however, that these cases are substantially identical, this Court has held that in the present case the conveyance of the system to the Ir-

rigation Districts discharged and displaced the mortgage of appellants while at practically the same time it held that such conveyances did not displace or discharge the lien of the Portland Wood Pipe Co. and approved the decision of the Illinois courts in the Lane & Bodley case. We think that the decision herein should have followed that in the other two cases.

The opinion in the Pipe Company case, Cause No. 2645, was written at the same time and by the same Judge as that in the case at bar, though not filed until March 20, 1916, and after stating that the sole issue in the case was whether the interest of the Districts could be subject to a mechanics' lien under the facts, the Court said:

> "The Court below did not find it necessary to determine whether the property of an irrigation district is subject to the lien laws of the State of Idaho, nor do we. For, conceding that an irrigation district is a public corporation, and that its property cannot be subjected to a lien for material furnished to the district direct or to a contractor with the district, *yet when an irrigation district or other public corporation acquires property from another it acquires it subject to all liens and burdens lawfully imposed upon it by the former owner just the same as any other purchaser.* In the present case the Irrigation and Power Company was in possession of the irrigation system as owner and was holding itself out to the world as such. It contracted for the construction of an irrigation system on its own property and material was furnished to be used in that system

for which a lien was given by the laws of the state. *That lien attached before the Irrigation District acquired the property and was not displaced by the conveyance to the district.*" (Our italics.)

In the same way the Crane Creek Irrigation Land and Power Company while in possession of this irrigation system contracted for the construction of the reservoir on its own property and gave a mortgage on all its property in payment for such work. This it might lawfully do both as to property which it then owned or property which it might thereafter acquire under the laws of Idaho, and as stated by this Court in its opinion herein, as the vendor of property under a contract of sale on which nothing had been paid it could lawfully mortgage its entire interest.

We have shown above that the mortgage contained an express provision whereby it could be released without necessitating a departure from the contract of purchase, and hence no burden was placed upon the property by this mortgage. It was therefore a burden "lawfully imposed" upon the property by the Crane Creek Company and the lien of such mortgage attached "before the Irrigation Districts acquired the property and was not displaced by the conveyance to the Districts."

In concluding its opinion in the Pipe Company case, after quoting at length from the case of Salem vs. Lane & Bodley, this Court says:

"While on grounds of public policy the property of municipal corporations held for public

> purposes may be exempt from the operation of the general lien laws of the state, yet such municipalities may not enter into contracts with third persons for the construction of plants or other improvements on the property of such third persons to be thereafter conveyed to the municipality and then claim the statutory exemption from liens for labor performed upon or materials used in the construction of the contemplated improvements."

Every word of this quotation applies with equal force to the mortgage of appellants, and we submit that no sound or valid distinction can be made between the cases and that the decision in the lien case should be followed here. In fact, this Court does not attempt to distinguish the two cases and by implication disapproves the attempts of the trial court to distinguish them, and the law upon the subject is thus left in a state of confusion. The most marked difference between the two cases is that the mechanics' lien must necessarily be paid in money, whereas the Districts could have secured a release from the mortgage in bonds. In the first case, they had to rely upon the Crane Creek Company carrying out its contract obligations, while in the latter they could have themselves deposited the bonds with the trustee named in the mortgage and required the Crane Creek Company to credit them with that amount on the purchase price. This difference makes appellants' case even clearer than that of the lien claimant.

It may be suggested that the difference arises from the fact that the mechanics' lien of the Pipe Company is created by statute and entitled to some special consideration but no valid distinction can be based upon this ground. The mortgage lien of appellants, it is true, arose directly from the contract of the vendor Crane Creek Company for the construction of one portion of this irrigation system, while the mechanics' lien of the Pipe Company arose indirectly from the contract of the Crane Creek Company as vendor for the construction of another part of the system. Appellants contracted directly for their lien while the lien statute gave the Pipe Company a lien by reason of its contract, but in the same sense the general principles of equity and the statutes of Idaho gave a lien upon present and future acquired property to a person who takes a mortgage on such property, and the lien of a mortgage created by act of the parties directly is certainly entitled to as much consideration as a mechanics' lien arising indirectly from such a contract.

The trial Court and this Court concede that appellants have and still have a valid and subsisting lien by mortgage on the interest of the Crane Creek Company in this project, and this lien of necessity vested so far as any of the property was then in existence when the mortgage was made in September, 1911. At that time not a dollar's worth of consideration had passed from the Districts. They had no equity in the system whatever but merely a contract for purchase when it should have been constructed. The

reservoir site and rights of way were already in existence and the lien of the mortgage vested at that time. No work was ever done on the reservoir by anyone but appellants and that work was all finished before anything was paid by the Districts. The particular structures constituting the distribution system, as the flumes, pipe lines, etc., became appurtenant to the rights of way as they were constructed, and the lien of appellants' mortgage attached to the structures as built. The Districts only paid for them upon monthly estimates and necessarily the work had already been done and the structures completed before these estimates were given. The conveyances also were based on these estimates, and hence as to every portion of the system the conveyances were all subsequent to the attaching of the mortgage of appellants.

In order, therefore, to sustain the decision of this Court herein, it is necessary to hold without qualification that a conveyance of property to an irrigation district subject to a valid and subsisting mortgage lien divests such mortgage lien. We have already shown that the cases of Crane Creek District vs. Portland Wood Pipe Co., No. 2645, in this Court, and Salem vs. Lane & Bodley Co., 189 Ill. 593, 82 Am. St. Rep. 481, hold clearly that mechanics' liens are not divested by such conveyances and the authorities show that the same rule must be applied to mortgages.

Thus, in Fidelity Trust and Guaranty Co. vs. Fowler Water Co., 113 Fed. 560, the plaintiff brought

action to foreclose a trust deed on the property of a waterworks company which had been conveyed to the town of Fowler and the town was made a party defendant. The town had passed an ordinance granting the waterworks company a franchise in the city, agreeing to pay a certain sum annually as hydrant rentals and agreeing that the company might mortgage its property and franchises. This ordinance also reserved to the town an option to purchase the property. The ordinance was accepted by the company which built the plant and mortgaged all its property to complainant and later the town exercised its option and the plant was conveyed to it, the conveyance reciting that the town did not assume the mortgage debt. The town was indebted to its constitutional limit and the question was the validity of the indebtedness as against it. The Court held (1) that the purchase by the town subject to the incumbrance created an indebtedness of the town to the full extent of such incumbrance, (2) that the option to purchase did not invalidate the ordinance, (3) that its exercise though illegal did not invalidate the contract to pay hydrant rentals, and (4) that the conveyance to the town was illegal but the mortgage was nevertheless valid as against the town. The Court said, at page 571:

> "It is difficult to see how a contract valid and enforceable before the exercise of the option to buy can be rendered invalid by the unlawful act of the town in attempting to purchase. The bondholders had the right to assume that the town would exercise the option to buy in good faith,

and would not attempt to do so when it knew the constitution prohibited it from making a lawful purchase. It may be that, as between the town and the water company, the conveyance would not be set aside by a Court of equity, at the suit of the water company, on the ground that each party was in *pari delicto*. The complainant and the bondholders, however, are in nowise implicated in the unlawful act, *and they have a right to have the conveyance of the waterworks adjudged illegal*. The town of Fowler can claim no advantage or benefit, as against the complainant and the bondholders, by reason of its receiving a conveyance of the waterworks pursuant to the option reserved in the ordinance.

"The title of the waterworks stands of record in the town of Fowler. The town is in the actual possession of the tangible property covered by the deed of trust. It is therefore, not only a necessary, but an indispensable, party to a suit for the foreclosure of the trust deed. A decree of foreclosure against the water company alone would not enable the purchaser at the foreclosure sale to obtain possession of the waterworks without further litigation against the town. The complainant was therefore under a necessity to make the town of Fowler a party defendant to the bill to procure an effective decree of foreclosure; and in such case it is according to the established course of procedure, in order to avoid multiplicity of suits and to prevent expense and delay to the parties, to proceed and give such final relief as the circumstances of the case may demand."

This decision has been quoted with approval in several cases and was followed in effect by Judge

Van Fleet in Wykes vs. City Water Co., 184 Fed. 752, and by this Court in the same case on appeal, City of Santa Cruz vs. Wykes, 120 C. C. A. 485, 202 Fed. 357, where the foreclosure of a similar bond issue was upheld. In the latter case, this Court points out clearly the difference between the action of a municipality in its governmental capacity and in its proprietary or quasi-private relations, and this distinction applies more forcibly to irrigation districts which exercise governmental functions only in regard to the levy and collection of assessments than it does to cities. The nature of such corporations is thus defined by the Supreme Court of Idaho in the case of Nampa and Meridian Irrigation Dist. vs. Briggs, 27 Ida. 84, 147 Pac. 75, where the Court says of an irrigation district:

> "It is a mutual co-operative corporation organized not for profit, engaged in distributing water to its members for use upon land within its district."

The effect of conveyances to irrigation districts has also been passed upon by the Supreme Court of Idaho, in Knowles vs. New Sweden Irri. Dist., 16 Ida. 217, 225; 101 Pac. 81, where the Court says:

> "The canal company could not sell any greater title than it possessed and when the irrigation district purchased, *it could neither purchase nor acquire any greater title or interest than its grantor owned and possessed. When it purchased this canal system, it purchased it subject to and burdened with the rights and equities of the appellant's grantor.*" (Our italics.)

In City of Nampa vs. Nampa & Meridian Irrigation District, 19 Ida. 779, 787, 115 Pac. 979, the Court states:

> "The question arises: Does the defendant, as an irrigation district, stand in any different situation from its predecessor? We think not. An irrigation district is a public quasi corporation, organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and they alone are benefited by its operations. It is, in the administration of its business, the owner of its system in a proprietary rather than a public capacity, and must assume and bear the burdens of proprietary ownership. In the case at bar it has simply purchased the system of the Boise City Irrigation & Land Co., and it acquired in the streets of the City of Nampa only such rights as its predecessor had."

See also:

> Smith vs. Faris-Kesl Co., 27 Ida. 407, 150 Pac. 25.

In the case at bar, if it be true, as this Court seems to have thought from its reference to the case of Voss vs. Waterloo Water Co., 163 Ind. 69, that the irrigation districts could not legally acquire title to this system subject to incumbrances, the necessary result is not that the lien of appellants' mortgage is divested but that the attempted conveyances to the Districts are invalid. This Court seems to assume, however, that the Districts by wilfully disregarding the provisions for release of the mortgage and obtaining illegal conveyances have divested the lien of ap-

pellants' mortgage, but this is as much as to say that any valid lien by mortgage on real property may be divested by the artifice of the mortgagor conveying the property to a municipal corporation which has no power to mortgage its property. The mere statement of such a proposition is its own refutation, and yet this Court apparently without realizing what its decision amounts to when reduced to its essence has done that very thing.

We think we have shown with sufficient clearness that the mortgage to appellants executed in payment of construction work included in the contract between the Crane Creek Company and the Districts and expressly made payable in bonds of the District to the extent of their interests, imposed no burden upon them which could not be discharged in accordance with the terms of their contract of purchase, that the Districts paid the Crane Creek Company with knowledge of appellants' rights, and therefore at their peril, and that the case of Crane Creek and Sunnyside Irrigation Districts vs. Portland Wood Pipe Co. argued with the case at bar and decided at the same time with it was correctly decided and should be followed in this case. If we are correct on these points, we submit a rehearing should be granted, but there are several other points in the opinion which require attention.

The Court refers in its opinion to the resolutions adopted by the Districts in the summer of 1914 as "so manifestly *ultra vires* that it calls for no discussion," but at this time no conveyances from the com-

pany to the Districts were of record and appellants had no knowledge that any such conveyances had been made. The District officers by their formal action on these resolutions obtained a delay of nearly six months in the institution of proceedings for the foreclosure of appellants' mortgage, during which time additional bond deliveries were made to the Crane Creek Company, and the settlement referred to in the opinion of the trial Court (tr. p. 183) was reached with the principal contractor, under which bonds and other securities which had been delivered to the Crane Creek Company were placed in the hands of a trustee for disbursement to various creditors of the project. This completely refutes the Court's theory that these resolutions were without consideration, and inasmuch as the Districts in this matter were acting in their proprietary capacity, we think the doctrine of estoppel should be applied.

In the case of City of Santa Cruz vs. Wykes, *supra*, this Court applied the doctrine of estoppel as against the city in a case of this kind, and we think that within the rule of this case the action of the Districts in recognizing the validity of this mortgage was not *ultra vires* in the sense that the transaction was absolutely and unalterably void, but, having received the benefit of appellants' inaction by a delay of several months in instituting foreclosure proceedings during which time they were able to effect a settlement with Slick Bros. Construction Co., the principal contractor under which that company lost its lien on the project, they will not now be permitted to disavow or abrogate their liability.

This Court also declines to pass upon the alleged illegality in the contracts of August 22, 1910, and the manner in which the District bonds were paid to the Crane Creek Irrigation Land and Power Co. under such contracts and the amendments thereto. This action is based upon the theory that these contracts have been executed and the mortgagors are not in a position to challenge or question what has been accomplished; but if the contracts are illegal or were executed in an illegal manner, then clearly the Districts must base their rights in every portion of this system which they claim solely upon the attempted conveyances, of which the deed set out at pp. 168-172 of the transcript is an example. As we have already pointed out, both the trial Court and this Court have held that appellants had a valid and subsisting lien on the interest of the Crane Creek Company in this project, and that this lien vested and attached to the various portions of the system prior to any of these conveyances. If these contracts are illegal, the District's rights must rest solely on the subsequent conveyances, and there is no legal basis whatever for holding that the conveyances take precedence over the prior mortgage. The authorities on these points are discussed sufficiently in appellants' brief (pp. 60-77), to which we beg leave to refer.

In this connection we wish again to call attention to the fact urged at the hearing and in our brief but apparently overlooked by the Court, that the conveyances from the Crane Creek Irrigation Land and Power Co. to the Sunnyside and Crane Creek Irriga-

tion Districts are not based upon the percentages shown by the contracts of August 22, 1910. Under these contracts the Sunnyside District was to have a 35.26% interest in the system, and the Crane Creek District a 21.75% interest (trans. pp. 101, 121). The deed (trans. p. 168) shows that the interest actually conveyed to the Sunnyside District was 47.2% of the system, and an examination of the other deeds, all of which are on file in this Court as original exhibits numbered 1 to 13 for each District, shows that all the conveyances to the Sunnyside District were in this proportion, while the conveyances to the Crane Creek District were all for a 22.4% interest. This matter is explained by Mr. Coulter at p. 150 of the transcript, where he says: "Since the execution of said two contracts of August 22nd, additional acreage has been added to each of said Districts, and the percentages called for in that contract are not the correct percentages." He does not state the date of this change, but it was without any notice to appellants and apparently subsequent to the date of their mortgage. This change seriously prejudices the rights of appellants, if it is to be finally held that their mortgage lien upon the Districts' property is lost by means of the conveyances, because when they took the mortgage the Crane Creek Company had a 43% interest in the system, and on this at least it is conceded that their mortgage has always been valid. Subsequently and without any notice to them, nearly 13% of this system is taken out from under their mortgage and

conveyed to the Districts. Surely it cannot be held that vested rights may be so disregarded. In this connection it may be well to point out also that paragraph 8 of the decree (tr. p. 210) so qualifies and limits the rights of appellants and the Crane Creek Company in the reservoir system as to make the mortgage security which is apparently left to appellants wholly valueless.

Wherefore, your petitioners respectfully submit that a rehearing should be granted in this cause, for this Court has erroneously assumed that appellants' mortgage was an additional burden placed upon the contract of purchase by the vendor, and that it could not be paid off by the Districts in their bonds and a proportionate reduction on the purchase price of the system made, and because this Court should have followed the decision in the case of Crane Creek Irrigation District et al. vs. Portland Wood Pipe Co., No. 2645.

Respectfully submitted,

RICHARDS & HAGA,

McKEEN F. MORROW,

Solicitors for Petitioners.

State of Idaho,
County of Ada,—ss.

I, Oliver O. Haga, of counsel for petitioners above named, do hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

OLIVER O. HAGA,

Solicitor and of Counsel for Petitioners Maney Bros. & Co.

No. 2649

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. H. MILLWEE and W. W. BALDWIN,
Plaintiffs in Error,

vs.

WM. N. C. WADDLETON,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1122—A.

S. H. MILLWEE and W. W. BALDWIN,
Plaintiffs in Error.

vs.

WM. N. C. WADDLETON,
Defendant in Error.

J. H. COBB, Juneau, Alaska,
Attorneys for Plaintiffs in Error.

Messrs. WINN & BURTON, Juneau, Alaska,
Attorneys for Defendant in Error.

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1122—A.

WILLIAM N. C. WADDLETON,
Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,
Defendants.

Complaint.

1. Plaintiff complains and alleges that on the 12th day of June, A. D. 1914, and for more than ten years immediately preceding said date, plaintiff was in the actual, exclusive, sole, notorious continuous, uninterrupted hostile, open and adverse possession under claim of ownership and is now the owner and entitled to possession

J. T. R.
Dep. Clk.

of that certain lot, parcel or piece of land situate in the City of Juneau, Territory of Alaska, and more particularly described as follows, namely:

Lot No. 6 in Block No. 13 of said city of Juneau, Alaska.

2. That while plaintiff was the owner of said above-described lot, and in the actual and exclusive possession thereof and on, to wit, the *12th* day of June, 1914, the above-named defendants unlawfully entered into the possession of said lot, or a greater portion thereof, and ousted and ejected the plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff to his damage in the sum of One Thousand ($1000) Dollars.

3. That the defendants have placed upon said above-described lot number and have commenced the construction of a [1*] building thereon, and have threatened to tear down the dwelling of plaintiff which is situate upon said above-described lot, and unless restrained by this court during the pendency of this action, the defendants will erect a building upon said described lot and tear down the dwelling of this plaintiff situate thereon.

WHEREFORE plaintiff prays judgment against the defendant.

First. For the restitution of the possession of the premises from which plaintiff has been ousted and ejected by the defendants in this complaint fully set forth and described.

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*Page-number appearing at foot of page of original certified Record.

Second. For the sum of $1000. for the withholding thereof.

Third. That the defendants be restrained from erecting any building or other structure or tearing down the dwelling of said plaintiff, pending this cause, and forever enjoined from interfering with the possession of the plaintiff in and to said Lot No. 6 in Block No. 13 of the City of Juneau, Alaska, or any part thereof.

Fourth. For costs and disbursements of this action.

Fifth. For such other and further relief as plaintiff may be entitled to.

WINN & BURTON,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Wm. N. C. Waddleton, being first duly sworn, on oath deposes and says: I am the plaintiff in the above and foregoing entitled action; I have read the foregoing complaint, know the contents thereof and the matters and things therein set forth are true as I verily believe.

WM. N. C. WADDLETON,

Subscribed and sworn to before me this 16 day of June, 1914.

[Seal] NEWARK L. BURTON,
Notary Public for Alaska. [2]

My commission expires on the 8th day of Nov. 1914.

[Endorsed]: No. ——. In the District Court for the Territory of Alaska, Division No. 1. William

N. C. Waddleton, Plaintiff vs. S. H. Millwee and W. W. Baldwin, Defendants. Complaint. Winn & Burton, Attorneys for Plaintiff. Juneau, Alaska. Filed in the District Court. District of Alaska, First Division. Jun. 16, 1914. J. W. Bell, Clerk. By J. J. Clarke, Deputy. [3]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1122—A.

WM. N. C. WADDLETON,

Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,

Defendants.

Answer.

Now come the above-named defendants, by their attorney, and for answer to the complaint, allege:

I.

They deny all and singular the allegations in said complaint contained, except the allegations of their possession.

And for a further and affirmative defence, they allege:

I.

That the defendant S. H. Millwee is the owner in fee simple, and entitled to the possession of the lot described in the complaint, and the defendant W. W. Baldwin is in possession as tenant of said S. H. Millwee, and he has no other interest therein.

WHEREFORE they pray that the plaintiff take nothing by this action, that his complaint be dismissed with costs and the defendants be quieted in the possession of said lot, and for general relief.

J. H. COBB,
Attorney for Defendants. [4]

United States of America,
Territory of Alaska,—ss.

S. H. Millwee, being first duly sworn, on oath deposes and says: I am one of the defendants above named. I have read the above and foregoing answer and the same is true as I verily believe.

S. H. MILLWEE,

Subscribed and sworn to before me this 13th day of July, A. D. 1914.

[Seal] J. H. COBB,
Notary Public in and for the Territory of Alaska,
My commission expires Nov. 9th, 1914.

Service admitted July 13th, 1914.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 1122–A. In the District Court for the Territory of Alaska, Division Number One, at Juneau. Wm. N. C. Waddleton, Plaintiff, vs. S. H. Millwee and W. W. Baldwin, Defendant. Answer. J. H. Cobb, Attorney at Law, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division, July 14, 1914. J. W. Bell, Clerk. [5]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1122—A.

W. N. C. WADDLETON,

Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,

Defendants.

Amended Reply.

Comes now the above-named plaintiff by his attorneys, Winn & Burton, and leave of the Court being first had and obtained files this his amended Reply in the above-entitled cause, and alleges as follows:

I.

Plaintiff denies each and every allegation contained in said affirmative defense excepting that the defendant, W. W. Baldwin, has no interest in the lot described in the complaint herein.

II.

And further replying to the Answer in the above-entitled cause, and by way of pleading the statute of limitations plaintiff alleges that he was in the actual, exclusive, sole, notorious, adverse and hostile possession of Lot 6 in Block 13 of the City of Juneau, Alaska, being the premises described in the complaint herein for more than 10 years immediately preceding the time when he was ousted from a portion of said Lot 6, Block 13, as alleged in his complaint, and more than 10 years immediately preceding the commencement of this action, and more than

10 years immediately preceding the filing of defendant's answer and affirmative defense and cross complaint herein.

WHEREFORE plaintiff asks for judgment as in his complaint herein prayed for. [6]

WINN & BURTON,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Wm. N. C. Waddleton, being first duly sworn, on his oath deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing amended Reply; knows the contents thereof and that he verily believes the matters and things therein stated are true.

[Endorsed]: No. 1122–A. In the District Court for the Territory of Alaska, Division No. 1. W. N. C. Waddleton, Plaintiff, vs. S. H. Millwee and W. W. Baldwin, Defendants. Amended Reply. Winn & Burton, Attorneys for Plaintiff, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Sept. 23, 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy. [7]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1122—A.

WILLIAM N. C. WADDLETON,

Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,

Defendants.

Judgment and Decree.

This action came on regularly for trial on the 24th day of September, 1914, the plaintiff being represented by Messrs, Winn & Burton, and the defendant by J. H. Cobb, Esq. A jury of twelve persons were regularly empaneled and sworn to try said action. After submitting all of the evidence, the argument of counsel and instructions of the Court, the jury retired to consider their verdict, and subsequently returned into court with the verdict signed by the foreman, and being called, answered to their names and say:

> "We, the Jury in the above-entitled cause, find for the plaintiff, that he is entitled to the possession of the property described in the complaint and that he is the sole owner thereof as against the defendant."

AND IT APPEARING TO THE COURT that the defendant, W. W. Baldwin, having by his answer disclaimed any interest in the property described in the complaint, except as tenant of said defendant, S. H. Millwee,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff is the sole owner, as against the defendant and defendants' grantors and those claiming by, through or under said defendants' of that certain lot described in the complaint in said above-entitled cause, to wit, Lot No. Six (6) in Block No. Thirteen (13) of the City of Juneau, Alaska; and that the plaintiff have and recover of and from the defendants the possession of said lot, and that the defendants and each of them be ejected from the possession of said lot or so much of the same as they are in [8] possession of, and that the plaintiff have and recover his costs and disbursements incurred in this action amounting to the sum of $100,25.

For all of which let execution issue.

Done in open court this 30th day of October, A. D. 1914.

ROBERT W. JENNINGS,
Judge.

O. K. as to form.
COBB.

[Endorsed]: No. 1122–A. In the District Court for the Territory of Alaska, Division No. 1. William N. C. Waddleton, Plaintiff vs. S. H. Millwee and W. W. Baldwin, Defendant. Judgment and Decree. Winn & Burton, Attorneys for Plaintiff, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Oct. 30, 1914. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [9]

[Testimony of Wm. N. C. Waddleton, for Plaintiff.]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 1122—A.

WM. N. C. WADDLETON,

Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,

Defendants.

Bill of Exceptions.

Be it remembered that this cause came on for trial on the —— day of ———, 1914, on the original complaint and answer, before the Judge of this court and a jury of twelve duly chosen, impaneled and sworn to try the issues. Opening statements having been made by counsel on both sides, the following proceedinge were had:

WM. N. C. WADDLETON, the plaintiff, being called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. BURTON.

My name is Wm. N. C. Waddleton. I am the plaintiff in the case of Wm. N. C. Waddleton vs. S. H. Millwee and W. W. Baldwin involving Lot No. 6 in Block 13, townsite of Juneau, Alaska. I have lived in Juneau for 21 years and a few months more; for the last eighteen years I have lived continuously on Lot 6 in Block 13, Juneau; I might have been in some other cabin for a night or two during 1895, but

I have lived continuously from 1896, the Spring of 1896, I think, continuously since then, until now in that cabin. [10*—1†] The lot is 50 by 90 feet in size. Mr. Winterholler continued to keep his cows in and hogs under this cabin that was a barn, until about 1893 when it blew down. Several people claimed title to the lot; J. T. Hamilton claimed title to it; Casebolt claimed it also; I had allowed Robert Rushlight to live in the cabin erected by Attorney J. T. Hamilton on the lot for a short time, and while Rushlight was on a drunk he sold it to Casebolt; and Casebolt, at the time of the contest before the trustee of the Townsite, gave me a quitclaim deed to it. In 1896 I occupied the lot alone and claimed the ownership to it at that time. This contest was in November, 1898. The Pullen heirs, through John G. Heid contested for it, and Lyons refused to acknowledge my claim and gave the deed to the Pullen heirs, he gave that deed to them during the year 1898. I was still in possession of the lot, and in 1901 or 1902 Thomas R. Lyons told me that the Department at Washington had decided against me on the appeal. In 1905 after that Mr. Heid, as the representative of the Pullen heirs, wrote to me to vacate the lot and cabin, and I have that letter here now that he wrote. I told him to proceed to do something—bring suit or something. I have been living on that same lot ever since the issuance of the patent and am still living on the lot, and the only time any one has attempted to

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

dispossess me or disturb me in any way at all was on the 12th day of June, 1914. In 1906 I built a sewer down across the lot from my cabin to a connection with the city sewer. I had a fence along in the front of the lot and running back on the lower side of it and turned up the hill; that is about nine or ten years ago or longer. After that time I built a stone wall there along in front of the lot and fixed some ground there for a garden and have had some flowers in there and alongside of the house. I built a foundation by the side of my cabin on this lot a year or two after that, built the foundation to place a house on it. I have slept in that cabin on the lot longer than any place since I was born, and expect to die there. [11—2] I have occupied the lot and paid the taxes on it all the time and claimed it.

Cross-examination by Mr. COBB.

I paid the taxes for all the years. I did allow Judge Delaney to pay the taxes one year for me; I wrote to Judge Delaney to pay them for me and he paid them; I think I paid for them all the years except the one year that he paid them for me. I paid them in 1913 when they were delinquent for the years 1909, 1910 and 1911. It is true that in July, 1912, the taxes were paid that year by Mr. Greene, for me at my request, with money which he had belonging to me. It is true that the receipt was given all the time and the assessment of the taxes made in the name of the Pullen heirs, John G. Heid, agent, but I objected to that each time I paid the taxes. About 9 years ago Mr. Gustafson bought the lot next and put a cabin there and over on my lot 23 inches,

and after that I notified him to take it off. I was in the Juneau jail at the time Greene paid the taxes for me, and that is the reason he paid them for me; and at that time he looked after the place for me and had the key while I was away. I never was away from the cabin for more than two or three nights at a time, and that would be when I was over at Douglas, or some place around close. I knew the Pullen heirs claimed this lot and I knew that the Townsite Trustees had decided in their favor and given them a deed for it as against me, and I was notified by Judge Lyons that the Department at Washington had decided against me when the contest was appealed. I remained in possession of the lot and claimed it after that because I thought I had a better right, the Pullen heirs had not been heard from and I did **[12—3]** not think they could get it. As a matter of fact only one of the Pullen heirs had ever been in Juneau, and that was in 1888. No claim whatsoever had been made by any of the Pullen heirs to the land in controversy and it formed no part of the inventoried Pullen estate and had never been occupied by any of the Pullen heirs. I was confined in the jail at Juneau for three months in the year 1903. I knew at the time that Heid wrote me the letter telling me to vacate the lot or pay rent that the Pullens claimed the lot. I answered the letter that Mr. Heid wrote to me and have a copy of the answer here.

Judge Lyons served a written notice on me of the decision of the land office against me on the contest.

WHEREUPON, defendants offered in evidence a

letter from Wm. N. C. Waddleton to John G. Heid, which said letter was received in evidence without objection, and is in words and figures as follows:

"Juneau, District of Alaska.
May 20th, 1905.

John G. Heid, Esq.,
Juneau, Alaska.

Dear Sir:—

It is not my intention to be unfair to you, personally, but I feel that as you are in position to make some concession in Re Lot 6 Block 13, it would not be out of keeping with generosity and mere dignity if you would suggest some sort of compromise.

I am not entirely unappreciative of my surroundings and position in this matter, and have long desired to settle it, amicably, if possible, therefore, I await your further action.

Yours etc., etc.,
WM. N. C. WADDLETON."

I received a quitclaim deed to Lot 6 in Block 13 from Mr. Rushlight, about the time of this contest for the deed before the townsite trustee. I have lost the quitclaim deed; it was never placed of record in the recorder's office. **[13—4]**

Whereupon, defendants introduced in evidence, without objection, a letter from John J. Heid addressed to Wm. N. C. Waddleton, which is as follows:

[Defendant's Exhibit "A"—Letter Dated Juneau, Alaska, May 18, 1905—John G. Heid to Wm. N. C. Waddleton.]

"Juneau, Alaska, May 18, 1905.

"To Wm. Waddleton:

You are hereby notified to come at once and make arrangements about either vacating or paying rent for the house and lot you are now occupying, to wit, Lot 6 in Block 13 of the Townsite of Juneau, Alaska, as per the official plat thereof, owned by James H. Pullen, Mary H. Wilson and Thomas A. Wilson, otherwise legal proceedings will be commenced immediately to eject you therefrom.

JAMES H. PULLEN,
MARY H. WILSON,
THOMAS A. WILSON.
By JOHN G. HEID,
Their Attorney."

"Dfts. Exhibit No. 'A.' Received in evidence Sept. 24, 1914, in cause No. 1122–A. J. W. Bell, Clerk. By J. T. Reed, Deputy."

I have testified that I wanted Mr. Heid to try to get me off of the lot; that is why I wrote him the letter as I did; I wanted him to do something; to start suit. I said that I was not unfair to him personally. That is true; I was not. I meant that I wanted him to have a friendly suit with me over the lot. It is true that I knew the townsite trustee had awarded the deed to the Pullens and against me and that that decision had been affirmed on appeal; but I did not think he could get me off the lot. I claimed the lot

for my own. I have been in the adverse, open, notorious and exclusive possession of that lot ever since I went on there, until the 12th day of June, 1914, this year; on that day I had been over at Douglas on some business and came back home about eight o'clock and when I went up to my cabin I saw a tent there on the lot and some men in the tent; and I asked them what they were doing there and they said they bought the lot—Mr. Baldwin said that he had bought the lot from the owners. I told him the lot was mine.

My cabin stands on the upper right hand corner of the lot **[14—5]** and is a two room building, about fifteen by twenty feet in size, and stands back some four or five feet from the corner of the lot on the upper side.

Redirect Examination.

This is a picture of my cabin taken about 1906 some time. And it shows the fence down in front, with a pile of lumber lying in the street in front of it; the fence runs down to the corner and then back on the lower side line of the lot for about thirty or forty feet and then turns back up the hill towards the mountain.

WHEREUPON, plaintiff introduced in evidence, without any objection from defendants, the said picture, which said picture is marked as Plaintiff's Exhibit ——, and made a part of the record herein.

WITNESS.—This is a picture of the interior of my cabin and was taken about the same time as the other photograph.

WHEREUPON, the said picture was introduced

in evidence by the plaintiff, and was admitted by the Court, without objection from the defendants, and marked by the clerk as Plaintiff's Exhibit ——.

Recross-Examination by Mr. COBB.

Those are the tax receipts for the taxes that I paid on Lot 6, Block 13. It is true that the receipts are issued to "Pullen Heirs, John G. Heid, Agent." I always objected to the receipts being so made out. They are marked, "Paid by Wm. N. C. Waddleton." What I meant when I wrote Mr. Heid that it was not my intention to be unfair to him personally was that I did not want him to be unfair to me and did not want to be unfair to him and did not want to make a personal matter of it. There had been a good deal of personal feeling among the attorneys here and I did not want him to feel that **[15—6]** way toward me.

(Witness excused.) **[16—7]**

[Testimony of John Gustafson, for Plaintiff.]

JOHN GUSTAFSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

My name is John Gustafson. I live in Juneau and have so lived since 1897. I have lived next lot to Mr. Wm. N. C. Waddleton for about nine years. Waddleton has lived on Lot 6, Block 13, town of Juneau, since I came to Juneau. I have heard that the Pullen heirs owned the lot and had the deed to it. In 1912 Waddleton asked me to remove some ashes that had accumulated from my place on the lot. I have seen Waddleton going and coming to

(Testimony of Wm. N. C. Waddleton.)

the place and during the time that I have lived at my present place no one but Waddleton has occupied the lot he lives on.

A survey was made to determine the lines and it was discovered that I was over plaintiff's lot with my cabin and I moved the same.

No cross-examination. **[17—8]**

[Testimony of L. A. Moore, for Plaintiff.]

L. A. MOORE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have resided in Juneau, Alaska, since the 22d day of July, 1895—have lived during that time on the 3d lot above the Elks' Hall. Waddleton moved on the lot he is now on soon after I got the place I live in. I know that for a good many years Waddleton has claimed that he owned the lot he is on; I think it has been for about fifteen years he has claimed to own it. I saw him build a stone wall along in front of the lot down in below the cabin, about a foot or a foot and a half high, and along next to the street; he built that wall several years ago, but I don't remember the exact time. The house Waddleton lives in was on the lot before he moved into it.

Cross-examination by Mr. COBB.

It is a fact that the house Mr. Waddleton lives in was on the lot and where it is now before he moved into it, but I think it was a barn before he moved in and fixed it up.

(Witness excused.) **[18—9]**

[Testimony of Patrick Evoy, for Plaintiff.]

PATRICK EVOY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have resided in Juneau for the past 28 years. I have known Wm. N. C. Waddleton for the past 20 years. I have lived in the town of Juneau and next to Waddleton for all the years since 1898; Waddleton was on the place where he now lives in 1898 and he has ever since been there. Waddleton built a stone wall along in front of the lot and about twenty-five feet long, below his cabin, about 6 or 8 years ago; and I saw him build a sewer there from the back end of his cabin down across the lot about the same time that he built the stone wall in front. That sewer was built down across the lot back about twenty-five feet from the street in front and was connected with the city sewer.

The front end of the lot was fenced down next to the street, and back a piece of the way—I don't know how far back—fenced about fifty feet back and then up towards the upper side of the lot.

While Mr. Waddleton was in jail in 1903 here in Juneau I had charge of the property for him and looked after it—had the keys to the house.

Cross-examination by Mr. COBB.

If Waddleton has been away from the property it has been for a short time only. The house was on the ground when he moved in.

(Witness excused.) **[19—10]**

[Testimony of E. R. Jaeger, for Plaintiff.]

E. R. JAEGER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have lived in Juneau since February, 1895. I lived at the head of Second Street then, up on the hill, east of Gold Street. I know that Mr. Waddleton has lived on the same lot where he now lives—to the best of my knowledge he has lived on that lot—I would consider that has been his home since 1895. I moved into the property where I now live in 1899 and Waddleton was living on the property then where he now lives. I don't know whether Waddleton has claimed to own it or not; but I do know, I remember, rather, that early, about the time that I left the present site of the Elks' Hall, 1899 or 1898, and I know that there was an adverse claim, and what disposition was made of it I don't know, but Waddleton remained in possession, and I presumed that the claim was settled in Waddleton's favor. Waddleton has claimed the property, because at the time we built the building occupied by the Cain Hotel we had occasion to use a certain portion of the property in order to get our material on the ground, and I spoke to him about using a corner of the lot.

No cross-examination.

(Witness excused.) **[20—11]**

[Testimony of Louis Corbielle, for Plaintiff.]

LOUIS CORBIELLE, a winess called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have lived in Juneau for 18 years past. I have known Wm. N. C. Waddleton for the past 16 years and I know that he has lived in the same place where he now lives all during that time.

No cross-examination. **[21—12]**

[Testimony of George Harkrader, for Plaintiff.]

GEORGE HARKRADER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have lived in Juneau since the town of Juneau was first discovered—33 years—since the first of April, 1881; I have been in Alaska since January, 1874, and have lived in Juneau for the last 33 years. I know Wm. N. C. Waddleton and know where he lives. I met him there by his house in 1896; I asked him at that time where he was living and he says "Right here," pointing to this house where he is living to day. He told me at that time that he owned the lot—in 1896.

No cross-examination. **[22—13]**

[Testimony of Henry Embola, for Plaintiff.]

HENRY EMBOLA, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have lived in Juneau since 1894. I have known

(Testimony of Henry Embola.)

Waddleton for 15 or 16 years. I now live in the same place where he lived when I first knew him 15 or 16 years ago. He told me first about ten years ago that the house and lot belonged to him.

No cross-examination. **[23—14]**

[Testimony of John Reck, for Plaintiff.]

JOHN RECK, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have lived in Juneau for 16 years. I know Waddleton and know where he lives. Waddleton lives upon the hill and he has lived in the same place ever since I have known him—I have known him for at least 14 years, maybe 15 years. I don't know anything about the titles, but he has always claimed to own that lot—it must be near 10 years since he has claimed to own that lot—about 1900 or 1902 or 1901; and the assessments of taxes for the city, he claimed the lot and said something about paying the taxes for the lot. Waddleton has often protested against the high assessments on his lot. I know personally that he was paying taxes on his lot.

Cross-examination by Mr. COBB.

I think there were others paying taxes on the lot, too, at some of the times—I think Judge Heid.

(Witness excused.) **[24—15]**

[Testimony of Thomas Knudson, for Plaintiff.]

THOMAS KNUDSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I live out at the bar, up the channel from Juneau. I have known Waddleton for fifteen years. I used to come into town with milk from the dairy and stop my teams on the property up on the hill where he lives. He has always lived on the same lot.

No cross-examination. [25—16]

[Testimony of Enoch Johnson, for Plaintiff.]

ENOCH JOHNSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have lived on Gastineau Avenue in the town of Juneau for a little over 20 years. I knew of Waddleton living the same place where he now lives 16 or 17 years ago; as far as I remember, he has always lived there. He claims that he owns that lot—he first told me that about 16 years ago, I guess.

No cross-examination. [26—17]

[Testimony of John F. Greene, for Plaintiff.]

JOHN F. GREENE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I have known Mr. Waddleton for four years past. Mr. Waddleton gave me his keys and asked me to look after his place while he was in jail; that was in 1912; he was living on that lot in 1912. For the

(Testimony of John F. Greene.)

year 1912 I paid the taxes for him on the lot, at his request.

Witness excused. [27—18]

[Testimony of John B. Marshall, for Plaintiff.]

JOHN B. MARSHALL, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. BURTON.

I am U. S. Commissioner of the Juneau Precinct and *ex-officio* Recorder for the Recording District in which the town of Juneau is embraced. I have here the book of records of the recording district which shows the official plat of the townsite of Juneau; and it shows that in 1902 Lot 6. Block 13, was embraced within the bounds of the townsite of Juneau, Alaska, that is lot 6 in Block 13 as it now is established.

Mr. COBB.—We will admit that fact.

Mr. BURTON.—All right, then.

Witness excused. [28—19]

WHEREUPON defendants introduced in evidence, without objection, deed from Townsite Trustee Thos. R. Lyons to Pullen heirs, which is as follows:

[Defendant's Exhibit "E"—Deed Dated November 10, 1898, Thomas R. Lyons to Pullen Heirs.]

THIS INDENTURE, made this 10th day of November, in the year of our Lord one thousand eight hundred and ninety-eight, by and between Thomas R. Lyons, as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and

James H. Pullen, Mary H. Wilson and Thomas A. Wilson, of ——, in the county of ——, and ——, of ——, part— of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 to 15, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," (26 Stats., 1095), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1898, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate, being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States marshal, *ex-officio* surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money

contemplated [29—20] by the instructions of the Secretary of the Interior, and

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said parties of the second part are interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said parties of the second part have paid the assessments upon said property amounting to the sum of thirty dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said parties of the second part and their heirs and assigns all the following lot, piece, and parcel of land situate in the town of Juneau, and Territory of Alaska, described as follows, to wit:

Lot six (6) in block thirteen (13) as per the official plat thereof.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand

and seal on the day and year first above written.

THOMAS R. LYONS, (Seal)

Trustee for the Townsite of Juneau, Alaska Territory.

In presence of:

ALFRED E. MALTBY.

EDWIN SHAW. [30—21]

Territory of Alaska.

BE IT REMEMBERED, that on this 10th day of November, A. D. 1898, before me, a Notary Public, came Thomas R. Lyons, to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal] ALFRED E. MALTBY. (Seal)

Notary Public for the District of Alaska.

Dfts. Exhibit *No.* "E." Received in evidence Sep. 25, 1914, in Cause No. 1122-A. J. W. Bell, Clerk. By J. T. Reed, Deputy. [31—22]

Whereupon defendant introduced in evidence, without objection, tax receipts for the years 1901, 1907, 1909, 1910, 1911, 1912 and 1913, as follows, same being marked Defendant's Exhibit "C."

[Defendant's Exhibit "C"—Tax Receipts for Years 1901, 1907, 1909, 1910, 1911, 1912 and 1913.]

No. 266. TAX RECEIPT. Amt. $6.00

Juneau, Alaska, June 28, 1911.

Received of W. A. Waddleton Six dollars, in full for general municipal taxes levied by the City of Juneau for the year 1911, on the following described property:

Lot.	Block.	Real or Personal.	Amount.
6	13	Lot & Cabin (Pullen Heirs)	6
		Total	6 00

B. M. BEHRENDS,
City Treasurer.
Per L. C. ELLIOTT.

No. 309 TAX RECEIPT Amt. $4.62

Juneau, Alaska, Mar. 8, 1901.

Received of W. N. C. Waddleton, Four and 62/100 Dollars, in full for general municipal taxes levied by the City of Juneau, for the year 1900, on the following described property:

Block.	Lot.	Real or Personal.	Amount.
13	6	Real	4 40
		Assessed to "Heirs of Pullen, see J. G. Heid"	
		Penalty 5%	22
		Total.....	4 62

B. M. BEHRENDS,
City Treasurer. [32—23]

CITY OF JUNEAU, ALASKA.

Delinquent TAX RECEIPT.

Received of William N. C. Waddleton for munici-

pal taxes for the year 1913, on the following described property:

Block.	Lot.	Description.	Valuation.	Tax.
13	6	Lot & Building as same appears on Delinquent Tax Roll of City of Juneau for year 1913 at page 2		24.00

Received payment Sept. 20, 1913.

Tax $24.00
Penalty 1.20
Interest ..... .15

Am't Paid 25.35

W. T. LUCAS,

No. 935.

Tax Collector.

By ————,

Deputy.

No. 0214. TAX RECEIPT. Amt. $9.00

Juneau, Alaska, 6/24, 1912.

Received of Pullen Heirs—J. G. Heid, Atty., ———— Dollars, in full for general municipal taxes levied by the City of Juneau for the year 1912, on the following described property:

Block.	Lot.	Real or Personal.	Amount.
13	6	Lot & Cabin	9 00
		Pd. by John Reck for W. N. C. Waddleton	
		Total	

B. M. BEHRENDS,

City Treasurer.

By B. N. SCHNOOR. [33—24]

No. 372 TAX RECEIPT Am't. $6.93

Juneau, Alaska, Jany. 22, 1908.

Received of John G. Heid Agt. for Pullen Heirs ———— Dollars, in full for general municipal taxes levied by the City of Juneau for the year 1907 on the following described property:

Block.	Lot.	Real or Personal.		Amount.
13	6	Lot & Bldg.	600	6 60
		Penalty		33
		Paid by Wm. N. C. Waddleton		6 93
		Total.....		

B. M. BEHRENDS,
City Treasurer.
By G. McNAUGHTON.

No. 361 TAX RECEIPT. Am't. $6.30

Received of Pullen Heirs—John G. Heid Agent ———— Dollars, in full for general municipal taxes levied by the City of Juneau for the year 1909, on the following described property:

Block.	Lot.	Real or Personal.		Amount.
13	6	Lot & Bldg.	600	6 00
		Penalty		30
		Paid by W. N. C. Waddleton		6 30
		Total.....		

B. M. BEHRENDS,
City Treasurer.
By McN. [34—25]

No. 350. Amt. $6.00

TAX RECEIPT.

Juneau, Alaska, 7/18, 1910.

Received of Pullen Heirs ———— Dollars, in full for general municipal taxes levied by the City

of Juneau for the year 1910, on the following described property:

Lot.	Block.	Real or Personal.		Amount.
6	13	Lot & Bldg.	600	6 00
		Paid by Waddleton		
		Total.....		

B. M. BEHRENDS,
City Treasurer.
By G. McN. [35—26]

[Defendant's Exhibit "D"—Tax Receipt for Year 1906]

No. 25. TAX RECEIPT. Amt. $6.60

Juneau, Alaska, Nov. 19, 1906.

RECEIVED OF Pullen Heirs, J. G. Heid, Agt. ——— Dollars, in full for general municipal taxes levied by the City of Juneau for the year 190—, on the following described property:

Block.	Lot.	Real or Personal.		Amount.
13	6	Lot & Bldg.	600.00	6 60
		Paid by Wm. N. C. Waddleton		
		Total.....		

B. M. BEHRENDS,
City Treasurer.
By G. McNAUGHTON.

Dfts Ex. "D" for Ident. 9/24/14 #1122—A. J. T. R., Dep. Clk. [36—27]

[Testimony of John G. Heid, for Defendant.]

JOHN G. HEID, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. COBB.

My name is John G. Heid. I have lived in Juneau for over 27 years. I am an attorney at law. I knew —— Pullen in his lifetime; he lived here in Juneau at one time. After his death I was the agent for Lot 6 in Block 13, for the Pullen heirs; the heirs consisted of J. H. Pullen, who was a son and Mary H. Wilson, who was a daughter of Pullen's, and her name before she married Thomas A. Wilson, was Mary H. Pullen.* ~~The Pullens used to live on Lot 6 in Block 13, and had a house on it, a residence, and they moved away and left their property,~~ there was two lots there; Casebolt got one of the lots, and Waddleton and some others claimed the other one, which is Lot 6 in Block 13, in controversy in this case; and we had a contest before the townsite trustee, over the lot, Crews representing Waddleton and I represented the Pullen heirs, under my power of attorney from J. H. Pullen. The result of the contest was that Thomas R. Lyons, Townsite Trustee, awarded the deed for the lot to the Pullen heirs, J. H. Pullen, Mary H. Wilson and Thomas A. Wilson, her husband. From this decision Waddleton appealed—this was in 1898, or along there somewhere—to the land office at Washington, and it was there decided against him and in favor of the Pullen heirs; that was in 1902. After the decision I met Waddleton and told him that he could remain on the

*Stricken by order of this court entered Dec. 4, 1915, pursuant to Certificate of Clerk of Court below, certifying that this matter was stricken from Original Bill of Exceptions when settled and should have been omitted from Transcript of Record and form no part thereof, and should not be considered.

(Testimony of John G. Heid.)

lot, but that he must pay rent; he said that he couldn't pay rent for the house, was unable to do so, and that the little shack was not worth any rent. Times in Juneau were very slow then and it didn't have much rental value, and as I wanted to have some one on the lot to occupy it for the heirs, I told Waddleton then that [37—28] he could stay on the lot but he must pay something, must do something, and that he must pay the taxes, at least, and he agreed to pay the taxes and keep them up, and so I let him stay on the lot. Time went on and he paid some of the assessments against it and part of the time I had to pay myself, until in 1905 I wrote him a letter and told Waddleton in substance, that he must come and pay rent or vacate the premises, and he answered me saying that he would compromise the matter in some sort of a manner. At that time property in Juneau was not worth much, and I could not find the Pullen heirs and hence let the matter go, but I told the man Waddleton that he must keep the taxes paid, at least; sometimes he paid them and sometimes they were delinquent. He used to be after me to fix up the place, but because he wouldn't pay any rent, never had anything, I would not fix it up. The tax assessments were always made to the Pullen heirs, John G. Heid, agent, and sometimes I would send the notification of the taxes due to him and tell him to pay them. There was no stipulated sum for rent; it was an old shack and no one else would live in it.

(Testimony of John G. Heid.)

In 1906 I paid $29.60 for street improvement in front of this lot.

I have here the tax assessment receipt, which I paid.

WHEREUPON, defendants offered in evidence said receipt which was admitted in evidence, and is as follows: **[38—29]**

[Defendant's Exhibit "G"—Tax Receipt.]

Feby. 28, 1906.

M. Pullen Heirs, J. G. Heid, Agent,
To City of Juneau, Dr.

Terms————.

Rockland St. Assessment, Lot 6, Blk. 13.....29.60

(Stamped)
Paid
Apr, 2, 1906,
B. M. Behrends, Banker,
Juneau, Alaska.

Defts. Exhibit No. "G." Received in evidence Sep. 25, 1914. In Cause No. 1122-A. J. W. Bell, Clerk. By J. T. Reed, Deputy. **[39—30]**

I paid that assessment myself.

Cross-examination by Mr. BURTON.

I knew the man was on this lot all the time, and I did not try to get him off except as I have said. I never instituted any suit to eject him. I notified him to get off or pay rent, and I left him in there, as I said, with the understanding that he was to pay the taxes and assessments against the lot as rent. I did not know that he was going to claim the lot until

(Testimony of John G. Heid.)

years after that; in fact, I did not think he could; I thought the matter was settled in the land office, and so I let him stay in there to hold the lot by someone occupying it for the Pullens. I never brought any suit to oust him after I wrote that notice in 1905 to him. I would see him at times and tell him to pay something, but he never had anything to pay with, so he would say. I never saw any fence around the lot at any time; he may have had a fence of some sort down in front along the street. The cabin on the lot used to be a barn, and is about twelve by fifteen or eighteen feet, and stands on one corner of the lot. The lot is 50 by 90 feet in size. Waddleton never said to me that he was not going to get off the lot nor pay rent or taxes and for me to sue him and put him off; and I did not so understand his letter to me. He never at any time told me to sue him, that he claimed the lot and I couldn't put him off.

J. H. Pullen is a brother of Mrs. Wilson, and Mr. and Mrs. Wilson own a half of the lot and J. H. Pullen the other half of it. I hold a power of attorney from J. H. Pullen. **[40—31]**

I never seen but one of the Pullen heirs, and this particular heir, J. H. Pullen, came to Juneau more than twenty years ago and expected to find quite an estate belonging to the Pullen heirs and was disappointed, and when shown this particular lot abandoned it and gave it up in disgust, and I have never received a letter or any word from him since that time, and I have never seen or heard at any time

from any of the other heirs; I do not know whether any of the heirs are living or dead; I never received any power of attorney from any of the Pullen heirs, excepting J. H. Pullen, which was prior to the said J. H. Pullen's coming to Juneau, and over twenty years ago; I have never communicated anything to J. H. Pullen for a great many years, or since the said J. H. Pullen was in Juneau, as aforesaid, concerning said lot. I have not heard from any of the Pullens or the Wilsons for a number of years—probably ten or more years; and I do not now know where they are.

On the —— day of ——, 1914, I conveyed the lot, under my power of attorney, to S. H. Millwee, by quitclaim deed.

WHEREUPON, the defendants offered in evidence Power of Attorney from J. H. Pullen to John G. Heid, covering Lot 6 in Block 13, Juneau, Alaska, to which tender the plaintiff then and there objected upon the grounds that it was irrelevant, incompetent and immaterial for any purpose; that it was a power of attorney given by only one of the owners of the property, and that he had not been heard from for years, etc.

Which objection was by the Court overruled and the said Power of Attorney admitted in evidence; to which ruling of the Court the plaintiff then and there in open court excepted.

Said Power of Attorney is as follows, to wit:

[41—32]

[Defendant's Exhibit "F"—Power of Attorney.]

KNOW ALL MEN BY THESE PRESENTS:

That I, J. H. Pullen, formerly of Barned, Maine, but now of the town of Juneau and District of Alaska, have made, constituted and appointed, and by these presents do make, constitute and appoint John G. Heid, of said town of Juneau in the said District of Alaska, MY TRUE AND LAWFUL ATTORNEY, for me and in my name, place and stead, to *to* take full charge of and exercise a general supervision over all my property, both, personal property and lands, situated, lying and being in the said town of Juneau, to wit:

All that certain piece or parcel of land or town lot, originally located by one George Murdoch on April 28th, 1881, and recorded in Book "B of Records" on page 246, of the records of Harris Mining District, Alaska; together with all buildings and improvements thereon situated. Also all that certain piece or parcel of land or town lot 50x100 feet, being the identical lot conveyed on October 1st, 1885, by R. D. Crittenden to James Pullen by deed as it will appear of record in book "A I of Deeds," at page 202 of the records of said Harris Mining District; together with all buildings and improvements thereon erected; to demise, lease, let, grant, bargain and sell the same to whom and upon such terms and conditions and under such covenants, as the said J. G. Heid may see fit, to sign, seal, execute and deliver good and sufficient deed or deeds to the purchaser or purchasers of the same, and to do any

and all acts necessary to be done in the premises in order to protect and advance my interests in the premises.

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done, in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute, shall lawfully do or cause to be done, by virtue thereof. [42—33]

IN WITNESS WHEREOF, I have hereunto set my hand and seal this fourteenth day of May, A. D. 1888.

J. H. PULLEN. (Seal.)

Executed in the presence of:

_____.

United States,
District of Alaska.

This certifies that on this fourteenth day of May, 1888, before the undersigned, personally appeared the within-named J. H. Pullen, known to me to be the person described in and who executed the within instrument, and acknowledged the same to be his free act and deed.

IN WITNESS WHEREOF, I hereunto set my hand and seal the day and year last above written.

LOUIS L. WILLIAMS,
U. S. Commissioner.

[Seal of the U. S. Commissioner's Court.]

[Endorsed]: Power of Attorney. J. H. Pullen to John G. Heid. ———, 188—.

District of Alaska,
Juneau,—ss.

The within instrument was filed for record at 11:30 A. M., Dec. 30th, 1898, and duly recorded in book 4, Powers of Atty. on page 174 of the records of said District.

NORMAN E. MALCOLM,
District Recorder.

Sept. 25, 1914. In Cause No. 1122-A. J. W. Bell, Dfts. Exhibit No. "F." Received in evidence Clerk. By J. T. Reed, Deputy. **[43—34]**

Defendants offered in evidence deed from John G. Heid to S. H. Millwee for Lot 6, Block 13, Juneau, Alaska.

Plaintiff objected thereto upon the grounds that the same is irrelevant, incompetent and immaterial, in that it purports to be a deed to the whole of the lot, while the power of attorney is from J. H. Pullen only, and hence only conveys as to Pullen's interest in it. And it is a variance between the pleading and the proof, in that defendants in the answer allege the sole ownership of the lot in Millwee and this deed shows that he only owns an undivided one-half interest in it.

Which objection was by the Court overruled and the said deed admitted in evidence.

To which ruling of the Court plaintiff then and there, in open court, excepted upon the grounds stated in his objection.

The deed is in words and figures as follows, to wit: [44—35]

[Defendant's Exhibit No. "E–1"—Deed Dated April 21, 1914, James H. Pullen et al, and S. H. Millwee.]

THIS INDENTURE, made this twenty-first day of April, in the year of our Lord one thousand nine hundred and fourteen, between James H. Pullen, Mary H. Wilson and Thomas A. Wilson, by John Heid, their attorney in fact, the parties of the first part, and S. H. Millwee of Juneau, Alaska, the party of the second part:

WITNESSETH: That the said parties of the first part, for *and consideration* of the sum of Ten Dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns, the following described tract, lot or parcel of land, situated, lying and being in the City of Juneau, Alaska, particularly bounded and described as follows, to wit:

Lot numbered Six (6) in Block numbered thirteen (13), according to the official plat of said City of Juneau, made by G. W. Garside, U. S. Surveyor, and approved by the Trustee of the Townsite of Juneau, Alaska.

Together with all and singular the tentments, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion

and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances unto said party of the second part, and to his heirs and assigns forever, without recourse to said parties of the first part or their said attorney in fact, herein named.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seal the day and year first above written.

JAMES H. PULLEN,
By JOHN G. HEID,
His Attorney in Fact.
MARY H. WILSON,
By JOHN G. HEID,
Her Attorney in Fact.

Signed, sealed and delivered in the presence of:
CHAS. G. JOY.
J. H. COBB. [45—36]
THOMAS A. WILSON,
By JOHN G. HEID,
His Attorney in Fact.

U. S. America,
District of Alaska,—ss.

This is to certify, that on this 21 day of April, A. D. 1914, before me, J. H. Cobb, a Notary Public in and for the District of Alaska, duly commissioned and sworn, personally came John G. Heid, as Atty. in fact for James H. Pullen, Mary H. Wilson, and Thomas A. Wilson, to me known to be the individual described in and who executed the within in-

strument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned and in the capacity therein stated.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] J. H. COBB,

Notary Public in and for Alaska, Residing at Juneau, Alaska.

My commission expires Nov. 9th, 1914.

Filed for record at 4:40 P. M., June 12, 1914, and duly recorded in Book 24 of Deeds, on page 469.

United States of America,
Territory of Alaska,
Juneau Recording Precinct,—ss.

I do hereby certify that the foregoing is a true and correct copy of the original records as taken from Book 24 of Deeds on page 469, and the whole thereof.

Dated September 25th, 1914.

[Seal of U. S. Commissioner.]

JOHN B. MARSHALL,
District Recorder.

Dfts. Exhibit No. "E-1." Received in evidence Sep. 25, 1914. In Cause No. 1122-A. J. W. Bell, Clerk. By J. T. Reed, Deputy. [46—37]

[Testimony of Wm. N. C. Waddleton, for Plaintiff (Recalled).]

WM. N. C. WADDLETON, recalled as a witness in his own behalf, testified as follows:

Redirect Examination by Mr. BURTON.

I heard Judge Heid's testimony about telling me to pay the taxes on the lot. It is not true that I promised to pay the taxes if he would let me stay in the house; he never told me to pay the taxes for him. I paid the taxes always for myself and because I claimed the lot for myself; and I always objected to the receipt and assessment being made out to the Pullen heirs, John G. Heid, agent.

In 1902 I received a written notice from Lyons, the townsite trustee, notifying me of the decision of the land office in the contest. The notice I have here is the one he served upon me.

WHEREUPON, the plaintiff offered in evidence the said notice, which said notice was by the Court admitted in evidence, without any objection from the defendant, and which notice is in words and figures as follows, to wit:

[Plaintiff's Exhibit No. 3—Notice.]

IN THE OFFICE OF THE TRUSTEE FOR TOWNSITE ENTRY OF LAND IN JUNEAU, ALASKA.

WM. N. C. WADDLETON,

vs.

JAMES H. PULLEN et al.

CONTEST LOT 6, BLOCK 13, JUNEAU.

To Wm. N. C. Waddleton, Contestant in the Above-entitled Contest:

You are hereby notified that the decision of the undersigned trustee in said contest has been affirmed by the Honorable Commissioner of the General Land Office; and you are further hereby notified that you have 60 days from the date of service of this notice upon you within which to appeal to the Honorable Secretary of the Interior. [47—38]

Dated this 18 day of January, 1902.

THOMAS R. LYONS,

Townsite Trustee for Juneau, Alaska.

Notice. Service admitted January 20, '02. Plaintiff's Exhibit No. 3, received in evidence, Sep. 25, 1914, in cause No. 1122A. J. W. Bell, Clerk. By J. T. Reed, Deputy."

[Endorsed]: "Received Feb. 3d, 1902, at 1 o'clock P. M. (Signed) Wm. N. C. Waddleton."

WHEREUPON THE TESTIMONY WAS CLOSED.

And the above and foregoing is the substance of all the testimony introduced in evidence on said trial.

BE IT FURTHER REMEMBERED that, at the close of the testimony the defendants made the following motion:

(Title of Court and Cause.)

"Now come the defendants, by their attorney, and move the Court to direct the jury to return a verdict for the defendants on the following grounds, to wit:

I.

Plaintiff has failed to produce any evidence which should support a verdict for him.

II.

Plaintiff has failed to produce in evidence any deed or other muniment of title to the premises in controversy, but relies solely upon the ten years' statute of limitation and the evidence fails to show that the plaintiff took or held any possession of the property adversely to the owner under an honest, *bona fide* belief or claim of ownership, [48—39] but such possession as plaintiff had was at all times subordinate to the true title; and the evidence further fails to show that the possession of the plaintiff was exclusive and actual as to any defined portion of said premises and is therefore insufficient to support a verdict for anything in plaintiff's favor.

J. H. COBB,
Attorney for Defendants."

Which said motion was by the Court denied and overruled. To which ruling of the Court the defendants then and there, in open court, excepted.

And thereupon the Court instructed the jury, peremptorily, to return a verdict for the plaintiff for an undivided two-thirds interest in and to the lot in con-

troversy, to which instruction of the Court the defendant then and there excepted.

And the Court thereupon further instructed the jury as to the remaining one-third interest.

The above and foregoing bill of exceptions is hereby approved, allowed, and ordered filed as a part of the record herein, and within the time allowed by the orders and rules of the Court, made during the term at which said cause was tried.

ROBERT W. JENNINGS,
Judge.

Ordered refiled after signing.

R. W. JENNINGS,
Judge. **[49—40]**

Copy of the foregoing received this 27th day of January, 1915.

WINN & BURTON.

Filed in the District Court, District of Alaska, First Division. Jan. 27, 1915. J. W. Bell, Clerk. By J. J. Clarke, Deputy.

Refiled in the District Court, District of Alaska, First Division. Jul. 20, 1915. J. W. Bell, Clerk. By ————, Deputy. **[50]**

In the District Court for Alaska, Division No. One, at Juneau.

No. 1122—A.

WM. N. C. WADDLETON,
Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,
Defendants.

Assignment of Error.

Now come the defendants, by their attorney, and assign the following errors committed by the Court on the trial of the above-entitled and numbered cause, upon which they will rely in the Appellate Court.

I.

The Court erred in refusing to grant the motion of the defendants, made at the conclusion of the testimony, to instruct the jury to find for the defendants.

II.

The Court erred in instructing the jury, peremptorily to return a verdict for the plaintiff for an undivided two-thirds interest in the property in controversy.

For said errors, and others manifest of record, defendants pray that the judgment of the District Court for Alaska be reversed, and the cause remanded.

J. H. COBB,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Dec. 18, 1914. J. W. Bell, Clerk. By John T. Reed, Deputy. [51]

In the District Court for Alaska, Division No. One, at Juneau.

WM. N. C. WADDLETON,

Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,

Defendants.

Writ of Error.

The President of the United States to the Honorable the Judges of the District Court for Alaska, Division No. One, Greeting:

Because in the record and proceeding as also in the rendition of the judgment upon a verdict, which is in the said District Court before you or some of you, wherein Wm. N. C. Waddleton, plaintiff, and S. H. Millwee and W. W. Baldwin, defendants, a manifest error hath happened, to the great damage of the said S. H. Milllwee and W. W. Baldwin,—

We being willing that error, if any hath happened, should be corrected, and speedy justice done to the parties in that behalf, do command you, if judgment be therein given, that then, under your hand and seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the City of San Francisco, in the State of California, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Appel-

late [52] Court may *may* cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, and the Seal of the District Court for Alaska, this the 18th day of December in the year of our Lord one thousand nine hundred and fourteen.

[Seal] J. W. BELL,
Clerk of the District Court for Alaska, Division Number One.

Allowed by:

ROBERT W. JENNINGS,
District Judge for Alaska, Division Number One. [53]

Filed in the District Court, District of Alaska, First Division. Dec. 18, 1914. J. W. Bell, Clerk. By ————, Deputy. [54]

In the District Court for Alaska, Division No. One, at Juneau.

No. 1122—A.

WM. N. C. WADDLETON,
Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,
Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, S. H. Millwee and W. W. Baldwin, as plaintiffs, and ——— P. L. Gemmett, as surety, are held and firmly bound unto Wm. N. C. Waddleton, in the penal sum of Seven Hundred and Fifty Dollars, to the payment of which sum well and truly to be made, we hereby bind ourselves, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that whereas the above-named Wm. N. C. Waddleton, as plaintiff, recovered a judgment against the above-named S. H. Millwee and W. W. Baldwin as defendants in the above-entitled and numbered cause, for the possession of Lot No. (6) Six in Block No. (13) Thirteen of the town of Juneau, Alaska, and costs; and whereas the abo*ut* bound S. H. Millwee and W. W. Baldwin are suing out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment.

NOW, THEREFORE, If the above-named defendants, as [55] plaintiffs in error, shall prosecute said writ of error to effect, and if they fail to make good their plea, shall answer all damages and costs, then this obligation shall be null and void; otherwise to remain in full force and effect.

WITNESS OUR HANDS this the 16th day of December, A. D. 1914.

S. H. MILLWEE.
W. W. BALDWIN.
P. L. GEMMETT.

Approved:

Dated 18th day of December, A. D. 1914.

ROBERT W. JENNINGS,
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Dec. 18, 1914. J. W. Bell, Clerk. By John T. Reed, Deputy. [56]

In the District Court for Alaska, Division No. One, at Juneau.

No. 1122—A.

WM. N. C. WADDLETON,
Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,
Defendants.

Citation.

United States of America,—ss.

The President of the United States to Wm. N. C. Waddleton, and to Messrs. Winn and Burton, His Attorneys, Greeting:

You are hereby cited and admonished to *be appear* in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty days

from the date of this writ pursuant to a writ of error filed in the clerk's office of the District Court for Alaska, Division Number One, in a case wherein S. H. Millwee and W. W. Baldwin are plaintiffs and you are defendant in error, then and there to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this the 19th day of July, 1915.

[Seal] ROBERT W. JENNINGS,
Judge.

Attest: J. W. BELL,
Clerk. [57]

Service of the foregoing citation in Error admitted this 19th day of July, 1915.

WINN & BURTON,
Attys. for Wm. N. C. Waddleton. [58]

Filed in the District Court, District of Alaska, First Division. Jul. 19, 1915. J. W. Bell, Clerk. By ————, Deputy.

No. 1122—A.

WM. N. C. WADDLETON,
Plaintiff,

vs.

S. H. MILLWEE and W. W. BALDWIN,
Defendants.

Praecipe for Transcript.

To the Clerk of the District Court for Alaska, Division Number One.

Dear Sir: Please make up a Transcript of the Record for the U. S. Circuit Court of Appeals for the Ninth Circuit in the above cause, and include therein the following:

1st—Complaint.
2d—Answer.
3d—Reply (filed Sept. 23, 1914).
4th—Judgment.
5th—Bill of Exceptions.
6th—Assignment of Errors.
7th—Writ of Error.
8th—Bond on Writ of Error.
9th—Citation.
10th—This Praecipe.

Said Transcript to be made up in accordance with the rules of the said Circuit Court of Appeals and transmitted to the clerk thereof in San Francisco, California.

J. H. COBB,
Attorney for Defendants and Plaintiffs in Error.

Filed in the District Court, District of Alaska, First Division. Jul. 20, 1915. J. W. Bell, Clerk. By J. J. Clarke, Deputy. [59]

In the District Court for Alaska, Division No. One, at Juneau.

No. 1122—A.

WM. N. C. WADDLETON,
Plaintiff and Defendant in Error,
vs.
S. H. MILLWEE and W. W. BALDWIN,
Defendants and Plaintiffs in Error.

Certificate [of Clerk U. S. District Court to Record.]

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the above and foregoing and hereto annexed fifty-nine pages of typewritten and written matter numbered from 1 to 59, both inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 1122–A, wherein Wm. N. C. Waddleton is plaintiff and defendant in error and S. H. Millwee and W. W. Baldwin are defendants and plaintiffs in error.

I further certify that the said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Twenty-seven and 15/100 Dollars ($27.15) has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled Court this 28th day of July, A. D. 1915.

[Seal] J. W. BELL,

Clerk of District Court, Dist. of Alaska, Division No. 1.

[Endorsed]: No. 2649. United States Circuit Court of Appeals for the Ninth Circuit. S. H. Millwee and W. W. Baldwin, Plaintiffs in Error, vs. Wm. N. C. Waddleton, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Received August 21, 1915.

F. D. MONCKTON,
Clerk.

Filed September 7, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

NO. 2649

United States

Circuit Court of Appeals

For the Ninth Circuit

S. H. MILWEE AND W. H. BALDWIN,
Plaintiffs in Error,

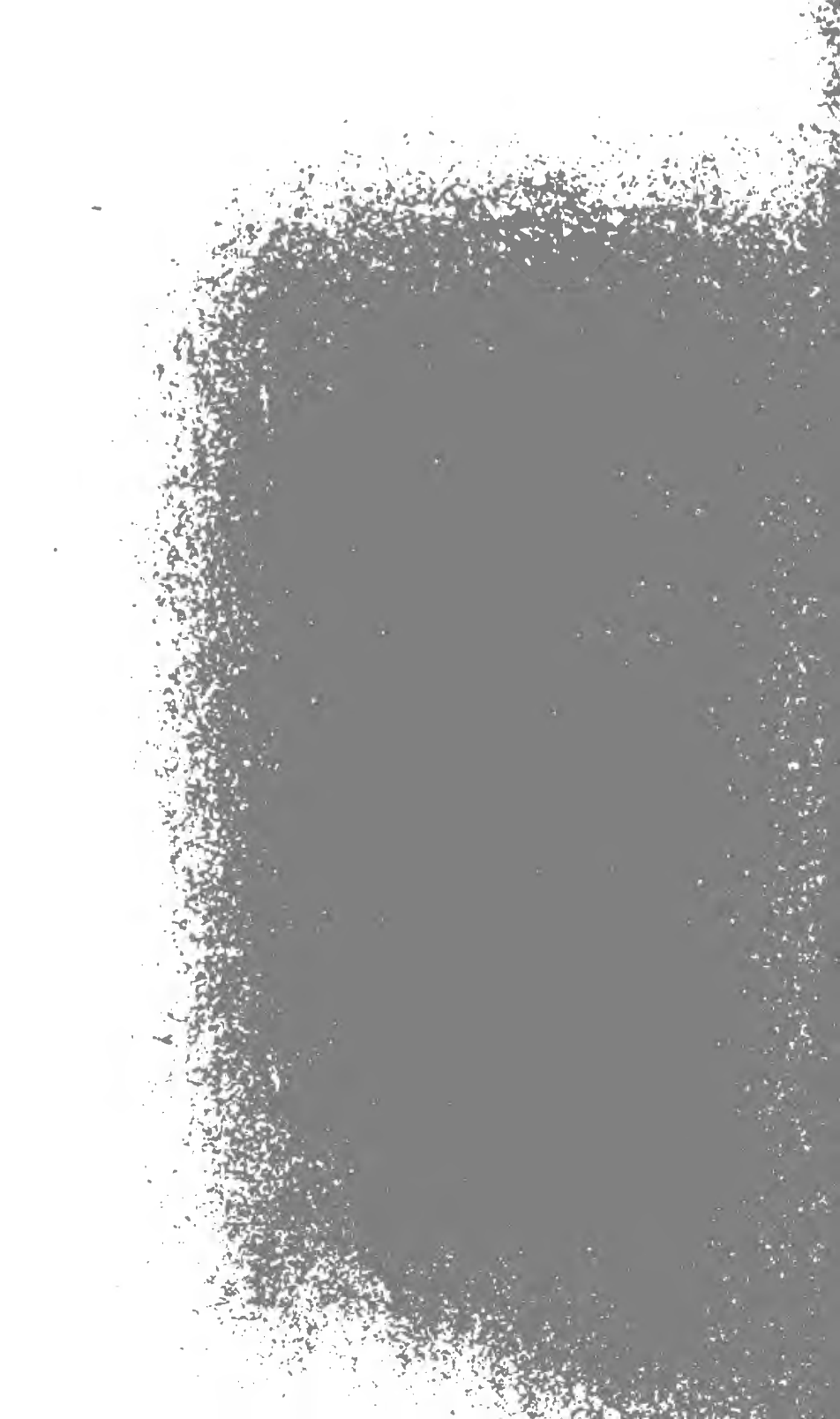
vs.

WM. N. C. WADDLETON,
Defendant in Error.

Brief for Plaintiffs in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISRICT OF ALASKA, DIVISION NUMBER 1.

J. H. COBB,
Attorney For Plaintiffs in Error.



NO. 2649

United States

Circuit Court of Appeals

For the Ninth Circuit

S. H. MILWEE AND W. H. BALDWIN,
Plaintiffs in Error,

vs.

WM. N. C. WADDLETON,
Defendant in Error.

Brief for Plaintiffs in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISRICT OF ALASKA, DIVISION NUMBER 1.

J. H. COBB,
Attorney For Plaintiffs in Error.

STATEMENT OF THE CASE

This was an action of ejectment brought by the Defendant in Error, who will hereinafter be referred to as the Plaintiff, against the Plaintiffs in Error, who will hereinafter be referred to as the Defendants, to recover a certain lot in the town of Juneau, Alaska. The title alleged by the plaintiff was under the ten years statute of limitation. The ouster alleged was on the 12th day of June, 1914. The defendant Baldwin answered that he was in possession only as a tenant of Milwee; the defendant Milwee plead title in fee simple.

In his Amended Reply the plaintiff denied the title of the defendant and again reiterated his plea of title by limitation.

The case was tried to a jury. At the conclusion of the evidence the defendants moved the Court to direct a verdict for the defendants upon the grounds, first—plaintiff has failed to produce any evidence which should support a verdict for him; second—plaintiff has failed to produce in evidence any deed or other muniment of title to the premises in controversy, but relies solely upon the ten years statute of limitation, and the evidence fails to show

that the plaintiff took or held any possession of the property adversely to the owner under an honest bona fide belief or claim of ownership, but such possession as plaintiff had was at all times subordinate to the true title and the evidence further fails to show that the possession of the plaintiff was exclusive and actual as to any definite portion of said premises and is therefore insufficient to support a verdict for anything in plaiff's favor. (Record Page 45.) The Court denied the motion and the defendants reserved their exception. The Court thereupon instructed the jury to return a verdict for the plaintiff for an undivided two-thirds interest of the lot on controversy, to which instructions the defendants excepted. (Record Pages 45 and 46.) The Court then submitted to the jury instructions as to the remaining one-third interest. The jury returned a verdict for the plaintiff and the defendants filed their Assignments of Error (Record Page 47) and brought the case here by Writ of Error.

The lot in controversy is a part of the patented townsite of Juneau (Record Page 24.) The lot was by the townsite trustee, Thos. R. Lyons, conveyed to James H. Pullen, Marry H. Wilson and Thomas R. Wilson on November 10th, 1898. (Record Pages 24 to 27.)

The testimony for the plaintiff shows that he was claiming the lot and was occupying it, or claiming to occupy it, prior to the date of the trustee's deed; that he was a party to the contest before the

townsite trustee between himself and the said Pullen, Mary H. Wilson and Thomas R. Wilson; that as a result of said contest the lot was awarded to the said Pullen and Wilsons; that the plaintiff appealed from the decision of the townsite trustee, but the said decision was affirmed by the Commissioner of the General Land Office. The plaintiff continued to occupy a small cabin which had formerly been a little barn on one corner of the premises from that time on and testified that he claimed the premises as his own. Plaintiff also paid, during said period, the taxes to the City of Juneau on said lot, which was at all times assessed as the property of the Pullen heirs. The tax receipts are shown in the Record, Pages 28 to 31, and a number of them are to John G. Heid as agent for the Pullen heirs, with a memorandum that it was paid by Wm. N. C. Waddleton. Plaintiff testified that the assessment to the Pullen heirs was always against his wish and protest. John G. Heid testified that as agent for the Pullen heirs he allowed the plaintiff to continue in the occupancy of the premises in consideration that he should pay the taxes, as during the greater portion of the period the lot had no particular rental value. According to Mr. Heid's testimony James H. Pullen was the owner of one-half of the lot and his sister, Mrs. Wilson, was the owner of the other half. Mr. Heid, under a power of attorney from James H. Pullen, executed a deed to the Defendant Milwee for the lot. (Record Pages 37 to 41.) The

above and foregoing is the substance of all the evidence bearing upon the questions involved.

ASSIGNMENTS OF ERROR.

1. The Court erred in refusing to grant the motion of the defendants made at the conclusion of the testimony, to instruct the jury to find for the defendants.

2. The Court erred in instructing the jury, peremptorily, to return a verdict for the plaintiff for an undivided two-thirds interest in the property in controversy.

ARGUMENT.

First—The theory upon which the trial court proceeded was that the plaintiff having shown prior possession, he was entitled to recover an undivided two-thirds interest upon such possession alone. The Court evidently overlooked the testimony of Mr. Heid that James H. Pullen was the owner of a one-half interest instead of only one-third interest, and

Second—That as to the remaining interest he was entitled to plead and maintain the title by limitation.

It may be conceded for the purpose of this argument, that the defendant Milwee was the owner of only an undivided interest in the lot, but legal title under the Government was conclusively shown to be in S. H. Milwee, Mary H. Wilson and Thomas H. Wilson as tenants in common, and the possession under the pleadings was in S. H. Milwee.

Unless then the plaintiff Waddleton showed some sort of title or right of possession of the property, he was not entitled to recover anything from a tenant in common in possession of the entire premises.

Dolph vs. Barney, 5 Ore. 191.
Dolph vs. Gold Creek M. & M. Co.,
6 L. R. A. N. S. 711.
Mather vs. Dunn, 74 Am. St. Rep. 788.

And a plea of title is sustained by proof of title to an undivided interest.

Stark vs. Barrett, 15 Cal. 362..
Mather vs. Dunn, supra.

Unless then there is some evidence upon which the jury were justified in finding that the plaintiff was entitled to the possession and ownership of the property by limitation, the Court should have peremptorily instructed them to find for the defendants.

Does the evidence justify any such finding?

Taking the testimony most strongly for the plaintiff it amounts to no more than this: that in a contest before the townsite trustee between himself and the true owners he was defeated and the patent title granted to his adversaries; that he was permitted to occupy the premises thereafter until dispossessed by the defendant, the grantee of one of the plaintiff's adversaries.

We think that this case is ruled by two decisions of this court. In the case of Jasperson vs.

Scharnikow, 150 Fed. 571, the facts were somewhat similar to those of the case above. In that case the Defendants in Error brought ejectment.. Their claim of title was by seizin under a patent from the United States issued in 1872, and the payment of all taxes assessed since that time. The Plaintiffs inError claimed right and title to said premises through their predecessor in interest, who, as they asserted, entered into th possession of the said premises in the year 1888 under a claim of right to the ownership thereof and adverse to all others and that such claim of right and possession was continuous, exclusive, actual and adverse for more than ten years preceding the commencement of the action. A verdict was directed for the plaintiffs in error. The trial court held that the entry of Bryant and wife, the predecessor of the plaintiff in error, was without any pretense "of having a right as owner of the property at the inception of their entry, which is necessary to make out a title by adverse possession. This idea of acquiring title by larceny does not go in this country. A man must have a bona fide claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession. The defendant's evidence fails to show any claim of right in Bryant when he went on the land. There is not a particle of testimony that squints in the direction that he supposed he had any rightor that he went there for any other purpose than

to acquire right if he could do so by holding long enough without molestation." This court, after quoting the above language, says: "The entry in the present case was not made on any claim or color of title and it could not work a disseizin of the owner. The grantor of the plaintiffs in error was a trespasser, a squatter on the land. He knew that the land had been patented to another."

So in this case, the defendant in error knew that the land had been patented to another and he will not be heard now to say that notwithstanding that fact he still claims the land. The fact that the Pullen heirs permitted him to continue the occupancy did not work a disseizin.

The Case of *Center vs. Cady*, 184 Fed. 605.

The material facts so far as the case at bar is concerned, were that the party pleading title by adverse possesstion did so in the face of a judgment in ejectment against him; he had nevertheless been allowed to continue upon the land in controversy for more than ten years. This court said: "There can be no good faith in such a claim in the face of a decision of a court of competent jurisdiction adjudging that the claimant has no title or right of possession. In May 1903 the Court from which the present appeal is taken rendered a judgment in ejectment, adjudging the title to the premises here in controversy to be in the appellee. From that time on the appellent could not claim in good faith unless he acquired

a claim of title in some way other than by merely retaining possession of the premises."

These two cases we believe to be conclusive upon the defendant in error, and that his possession under the circumstances stated was not such as to entitle him to maintain a claim for title by adverse possession, and the motion of the plaintiffs in error for the court to instruct the jury to return a verdict for them should have been granted. The same rule is announced in Root vs. Woolworth, 150 U. S. 401. One of the points in that case was whether one holding possession after a decree against him settling the title to the land to be in another, could successfully plead title by adverse possession as against his former adversary, and it was held that such possession would be presumed to be held in subordination to the true owner until express notice was given that th actual possession was adverse. "Without such notice," says the Court, "the length of time intervening between the decree and the present suit would give him no better right than he previously possessed." (Page 415.)

Upon the question raised by the court's instructions to the jury to find peremptorily for the plaintiff for two-thirds undivided interest, we call the Court's attention to the case of Bradshaw vs. Ashley, 180 U. S. 59. The Court there had occasion to go into the question of the presumption of title arising from possession and as to when prior possession alone was sufficient to entitle the plaintiff to re-

cover and when it is not. On page 63 the Court says: "The question is what presumption arises from the fact of possession of real property? Generally speaking the presumption is that the person in possession is the owner in fee. If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of of title. Therefore, when in an action of ejectment the plaintiff proves that on the day named he was in the actual, undisturbed and quiet possession of the premises, and the defendant thereupon entered and ousted him, the plaintiff has proved a prima facie case, the presumption of title arises from the possession, and unless the defendant proved a better title, he himself must be ousted. Although he proves that some third person, with whom he in no manner connects himself, has title, this does him no good, because the prior possession was sufficient to authorize him to maintain it as against a trespasser, and the defendant being himself without title, and not connecting himself with any title cannot justify an ouster of the plaintiff. This is only an explanation of the principle that the plaintiff recovers upon the strength of his own title. His title by possession is sufficient, and it is a title, so far as regards the defendant who only got his possession by a pure tort, a simple act of intrusion or trespass with no color or pretense of title." And on page 64 the Court, quoting from Mr. Justice Matthews, says: "This rule is founded upon the presumption that possession peace-

ably acquired is lawful, and is sustained by the policy of protecting the public against violence and disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended."

So in the case at bar when the plaintiff showed the circumstances under which his possession, whatever it may have been, as against James H. Pullen, the grantor of the defendant, originated, that it had been litigated and decided against him by a tribunal of competent jurisdiction, there could no longer be any presumption of title from such possession.

We respectfuly submit that the judgment should be reversed and the cause remanded with instructions to grant a new trial and upon such trial to direct a verdict for the defendants.

J. H. COBB,

Attorney for Plaintiffs in Error.

NO. 2649

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

S. H. MILWEE and W. W. BALDWIN,

Plaintiffs inError.

vs.

WM. N. C. WADDLETON,

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Answer Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

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STATEMENT

It is alleged in the Complaint in this case that plaintiff was in the actual, exclusive, sole notorious, continuous, uninterrupted, hostile, open and adverse possession under a claim of ownership, and was the owner and entitled to possession of a certain lot, parcel or piece of land described as Lot 6 in Block 13 of the City of Juneau, and that the defendants unlawfully entered into the possession of said lot, or a greater portion thereof, and ousted and ejected the plaintiff therefrom, and were unlawfully and wrongfully withholding the possession from said plaintiff. (P. R. 1-2.)

The Answer denies all the allegations contained in the Complaint, except as to the possession of the plaintiff, and sets up an affirmative defense in which it is alleged that the defendant, S. H. Millwee is the owner in fee simple and entitled to the possession of the lot described in the Complaint, and that the defendant, Baldwin, is in possession as tenant of Millwee, but that Baldwin has no other interest therein. (P. R. 4-5.)

In the Amended Reply plaintiff denies each and every allegation contained in the affirmative defense of the Answer, except that the defendant Baldwin has no interest in the lot described in the Complaint.

And further replying to the Answer, the plaintiff pleads the Statute of Limitations by reason of his actual, exclusive, sole, notorious, continuous, uninterrupted, hostile, open and adverse possession of said Lot 6 in Block 13 of the City of Juneau for more than ten years immediately preceding the time when he was ousted from a portion of said Lot 6 in Block 13 as alleged in the Complaint, and more than ten years immediately preceding the commencement of this action, and more than ten years immediately preceding the filing of defendant's Answer and affirmative defense and Cross Complaint. (P. R. 6-7.)

The case was tried before a jury. From the transcript of record it appears that the attorney for defendants, Millwee and Baldwin, at the conclusion of the evidence, moved the court to direct the jury to return a verdict for defendants on the following grounds, to-wit:

I.

Plaintiff has failed to produce any evidence which should support a verdict for him.

II.

Plaintiff has failed to produce in evidence any deed or other muniment of title to the premises in controversy, but relies solely upon the ten years' statute of limitation and the evidence fails to show that the plaintiff took or held any possession of the property adversely to the owner under an honest bona-fide belief or claim of ownership, but such pos-

session as plaintiff had was at all times subordinate to the true title; and the evidence further fails to show that the possession of the plaintiff was exclusive and actual as to any defined portion of said premises and is therefore insufficient to support a verdict for anything in plaintiff's favor.

The foregoing motion was denied and overruled: (P. R. 45.)

The Court thereupon instructed the jury to return a verdict for the plaintiff, Waddleton, for an undivided two-thirds interest of the lot in controversy. (P. R. 45-46.)

As to the remaining one-third the court submitted the same to the jury under instructions. (P. R. 46.)

Thereupon the jury returned the following verdict:

> "We, the jury in the above entitled cause, find for the plaintiff that he is entitled to the possession of the property described in the complaint, and that he is the sole owner thereof as against the defendants."

The following are extracts from the testimony of the plaintiff, Waddleton:

> "I have lived continuously on Lot 6, Block 13, Juneau, for the last 18 years." (P. R. 10.)
>
> "I have lived continuously from the Spring of 1896 until now in that cabin." (P. R. 11.)
>
> "In 1896 I occupied the lot alone and claimed the ownership to it at that time. This contest

(in the Land Office) was in November, 1898. The Pullen heirs, through John G. Heid contested for it and Lyons (townsite trustee) refused to acknowledge my claim and gave the deed to the Pullen heirs * * * during the year 1898. I was still in possession of the lot, and in 1901 or 1912 Thomas R. Lyons told me that the Department at Washington had decided against me on the appeal." (P. R. 11.)

"I have been living on that same lot ever since the issuance of the patent and am still living on the lot and the only time anyone has attempted to dispossess me or disturb me in any way at all was on the 12th day of June, 1914." (P. R. 11-12.)

"I have occupied the lot and paid the taxes on it all the time and claimed it." (P. R. 12.)

"I knew the Pullen heirs claimed this lot and I knew that the townsite trustee had decided it in their favor and gave them a deed for it as against me and I was notified by Judge Lyons that the Department at Washington had decided against me when the contest was appealed. I remained in possession of the lot and claimed it after that because I thought I had a better right; the Pullen heirs had not been heard from and I did not think they could get it." (P. R. 13.)

"No claim whatsoever had been made by any of the Pullen heirs to the land in controversy and

it formed no part of the inventoried Pullen estate and had never been occupied by any of the Pullen heirs." (P. R. 13.)

"I claimed the lot for my own. I have been in the adverse, open, notorious and exclusive possession of that lot ever since I went on it until the 12th day of June, 1914 this year." (P. R. 15-16.)

The following are extracts from the testimony of L. A. Moore:

"I have resided in Juneau, Alaska since the 22nd day of July, 1895, and have lived during that time on the third lot above the Elks Hall (near lot in controversy) (P. R. 18.)

"I know that for a good many years Waddleton has claimed that he owned the lot he is on; I think it has been for about fifteen years he has claimed to own it. I saw him building a stone wall along in front of the lot down in below the cabin, about a foot or a foot and one-half high, and along next to the street; he built that wall several years ago but I do not remember the exact time." (P. R. 18.)

The following are extracts from the testimony of Patrick Evoy:

"I have lived next to Waddleton for all the years since 1898; Waddleton was on the place where he now lives in 1898 and has ever since been there. Waddleton built a stone wall along in front of the lot and about 25 feet long, below

his cabin, about six or eight years ago; and I saw him build a sewer there from the back end of his cabin down across the lot about the same time that he built the stone wall in front. That sewer was built down across the lot back about 25 feet from the street in front and was connected with the city sewer." (P. R. 19.)

The following are extracts from the testimony of E. R. Jaeger:

"I know that Mr. Waddleton has lived on the same lot where he now lives—to the best of my knowledge he has lived on that lot—I would consider that it has been his own since 1895. I moved into the property where I now live in 1899 and Waddleton was living on the property then where he now lives. I do not know whether Waddleton has claimed to own it or not but I do know, I learned rather , that early about the time that I left the present site of the Elks Hall in 1898 or 1899 and I know that there was an adverse claim and what disposition was made of it I do not know but Waddleton remained in possession and I presumed that the claim was settled in Waddleton's favor. Waddleton has claimed the property because at the time we built the building occupied by the Cain Hotel we had occasion to use certain portions of the property in order to get our material on the ground and I spoke to him about using a corner of the lot." (P. R. 20.)

The following are extracts from the testimony of George Harkrader:

"I have been in Alaska since January, 1874 and have lived in Juneau for the last 33 years. I know Wm. N. C. Waddleton and know where he lives. I met him by his house in 1896 * * *. He told me at that time that he owned the lot—in 1896." (P. R. 21.)

The following are extracts from the testimony of Henry Embola:

"I have known Mr. Waddleton for 15 or 16 years. He told me first about 10 years ago that the house and lot belonged to him." (P. R. 21-22.)

The following are extracts from the testimony of John Reck:..

"I have known him (Waddleton) for at least 14 years, maybe 15 years * * *. He has always claimed to own that lot—it must be nearly 10 years since he has claimed to own that lot—about 1900 or 1902 or 1901; and the assessments of taxes for the city, he claimed the lot and said something about paying the taxes for the lot. Waddleton has often protested against the high assessments on his lot. I know personally that he was paying taxes on his lot." (P. R. 22.)

(Note—Mr. John Reck was one of the councilmen for the City of Juneau, which fact he testified to but it does not appear in the narrative form of his testimony.)

The following are extracts from the testimony of Enoch Johnson:

> "I knew of Mr. Waddleton living in the same place where he now lives 16 or 17 years ago; As far as I remember he has always lived there. He claims that he owns that lot—he first told me that about 16 years ago, I guess." (P. R. 23.)

The only testimony introduced by the plaintiff in error is the evidence of Mr. John G. Heid, an attorney at law. He testified that there was a contest between Waddleton and the Pullen heirs concerning the property in controversy before the townsite trustee somewhere in the year 1898, and that deed was awarded to the Pullen heirs and Waddleton appealed to the Land Office at Washington and it was there decided, in 1902, against him and in favor of the Pullen heirs. (P. R. 32.)

He further testified that Waddleton, the defendant in error, continued to remain on the property; that "I told Waddleton then that he could stay on the lot but he must pay something, must do something, and that he must pay the taxes at least, and he agreed to pay the taxes." (P. R. 33.)

He further testified, "At that time property in Juneau was not worth much, and I could not find the Pullen heirs and hence let the matter go." (P. R. 33.)

Again, on Cross-Examination, he testified, "I knew the man was on this lot all the time, and I did not try to get him off except as I have said. I never

instituted any suit to eject him." (P. R. 34.) "I did not know that he was going to claim the lot until years after that; in fact, I did not think he could." (P. R. 34-35.)

"I have never seen but one of the Pullen heirs, and this particular heir, J. H. Pullen, came to Juneau more than twenty years ago and expected to find quite an estate belonging to the Pullen heirs and was disappointed, *and when shown this particular lot abandoned it and gave it up in disgust, and I have never received a letter or any word from him since that time, and I have never seen or heard at any time from any of the other heirs; I do not know whether any of the heirs are living or dead; I never received any power of attorney from any of the Pullen heirs, excepting J. H. Pullen, which was prior to the said J. H. Pullen's coming to Juneau, and over twenty years ago; I have never communicated anything to J. H. Pullen for a great many years, or since the said J. H. Pullen was in Juneau, as aforesaid, concerning said lot. I have not heard from any of the Pullens or the Wilsons for a number of years—probably ten or more years; and I do not now know where they are.*"

(P. R. 35-36.)

The defendant in error, on rebuttal, testified:

"It is not true that I promised to pay the taxes if he would let me stay in the house; he (Heid) never told me to pay the taxes for him.

I paid the taxes always for myself and because I claimed the lot for myself; and I always objected to the receipt and assessment being made out to the Pullen heirs, John G. Heid, agent." (P. R. 43.)

ARGUMENT

The Defendant in Error was plaintiff below, and in this argument we will refer to him as plaintiff and to the plaintiff in error as the defendant.

From the evidence, extracts of which are given under the foregoing statement of the case, the following facts are fully established, Viz:

First,—That the plaintiff went into possession of the lot in controversy in the Spring of 1896, claiming to own the same, and from that time up to June 12, 1914, when the defendant ousted him from a portion of said lot, *plaintiff held the exclusive possession thereof.*

Second,—That a contest was had between the plaintiff and the Pullen heirs, under whom the defendant claims title, before the United States Land Department concerning said lot, and that as a result of this contest, a deed was given by the trustee of the townsite of Juneau to James H. Pullen, Mary H. Wilson and Thomas A. Wilson, which said deed was executed on the 10th day of November, 1898. (See deed P. R. 24.)

Third,—*That the plaintiff continued in possession after the execution of the trustee's deed, above*

mentioned, and no steps or legal proceedings were ever instituted to eject him from the premises.

Fourth,—That the testimony of the plaintiff is, that at all times ever since he went into possession of the lot in 1896 he has claimed to own the lot in controversy as his own, *and that his possession was adverse, open, notorious and exclusive* (P. R. 16). *and that he has claimed to own said lot for more than* 15 *years* is corroborated by other witnesses (P. R. 19, 20, 21, 22 and 23.) That the only testimony, which in any way attempts to contradict the evidence introduced on the part of the plaintiff, is the indefinite testimony of John G. Heid that in 1902 he told the plaintiff he must do something—and that he must pay the taxes at least.

Fifth,—That John G. Heid only represented one of the grantees named in the trustees deed, Viz: James H. Pullen, and according to Mr. Heid's own testimony, he, Pullen, more than 20 years ago, came to Juneau and when shown the lot in controversy "*abandoned it and gave it up in disgust*"; and this was subsequent to the execution of the Power of Attorney by the said James H. Pullen to the said John G. Heid, under which power of attorney, the said Heid purports to convey the lot in controversy to the defendant, Milwee, and the said Heid has not received any communication or word from the said Pullen since that time—over 20 years ago.

That so far as Mary H. Wilson and Thomas A. Wilson, the other two grantees in the trustee's deed

are concerned, they are not claiming to own said lot and Mr. Heid at no time ever communicated with them, or ever heard from them, and it is not known whether any of the parties are living or dead.

Sixth,—That the said trustee's deed conveys said lot in controversy to the said James H. Pullen, Mary H. Wilson and Thomas A. Wilson, and does not mention any specific interest to each party, but merely conveys the lot to them.

With the foregoing evidence before the jury, the defendant made a motion for a directed verdict, which motion is set forth in the brief of defendant on appeal, and appears on page 45 of the printed record.

Because the trial court refused to grant this motion, and instructed the jury to return a verdict for plaintiff for an undivided two thirds interest in the property in controversy, the defendant appeals.

The assignment of errors merely states that the court erred in refusing to grant said motion, and also erred in instructing the jury peremptorily, to return a verdict for plaintiff for an undivided two-thirds interest in the property.

Neither the motion nor the assignment of errors point out specifically, or at all, wherein the evidence was insufficient to support a verdict for the plaintiff. It states generally "that plaintiff has failed to produce any evidence which should support a verdict for him."

We believe, under the established rules as well as decisions of Appellate Courts, no error will be considered unless the same are clearly and specifically assigned, and errors not so assigned will be disregarded.

However, we can conceive of no case under the Statutes of any State of the Union where the evidence could be more convincing and less conflictive in support of an adverse possession than in this case. It included all the elements of an adverse claim. The lot in controversy was held by the plaintiff, under a claim of ownership, ever since he went upon the lot in 1896, and from that time up to June 12, 1914, when he was ousted from a portion thereof by the defendant, and immediately brought this action to protect his claim of adverse possession, he was in the actual, exclusive, sole, notorious, continuous, uninterrupted, hostile, open and adverse possession thereof, at all times claiming to own said lot.

At the time of the contest before the Land Department in 1898 to determine who should receive trustee's deed for said lot, plaintiff continued in possession, and although the decision of the Department rendered in November, 1898, was against him, he still continued in possession and appealed to the Land Office at Washington, and although the Land Office at Washington, in 1902, affirmed the decision of the townsite trustee, yet, nevertheless, the plaintiff did not surrender his possession but continued to hold and occupy said lot, without any break in the

continuity of his actual possession, until June 12, 1914, aforesaid, and *more than ten years* from 1902, the date of the affirmance by the Land Office at Washington of the decision of the townsite trustee.

Neither the decision of the townsite trustee nor of the Land Office at Washington were offered in evidence, and so far as the record shows, such decisions merely authorize or confirm the execution of turstee's deed dated November 10, 1898, conveying the lot to the said James H. Pullen, Mary H. Wilson and Thomas A. Wilson.

We contend:

(1). *That the possession of the lot in dispute by the plaintiff was continuously maintained from the Spring of the year* 1896, *and his adverse possession thereof, started at least from the date of the execution of the townsite trustee's deed to the Pullen heirs on November* 10, 1898, *and was thereafter continuously maintained up to June* 12, 1914, *without any break in the continuity of such adverse possession.*

> One who enters upon land supposing it to belong to the United States, in the expectation and with the intention of preempting it, and whose possession is actual, open, continuous, uninterrupted, visible, notorious, distinct and definite while the Statute of Limitations runs, holds in hostility and adverse to the holder of the record title, and to everybody else, except the United States.

Clemens v. Runcket, 84 *Am. Dec.* 69.

In the case at bar there was no judgment or decree of any court; there was merely a decision by the Land Department upon a contest between the plaintiff and the Pullen heirs which authorized or confirmed the execution of the townsite trustee's deed to them.

If, however, there had been a judgment,

> "The mere recovery of a judgment will not of itself stop the running of the statute of limitations. There must be an actual change of possession by virtue of such judgment, and where the plaintiff in ejectment neglects to enforce his judgment within the period laid in his demise, his right of entry under that judgment is altogether gone."
>
> 1 *CYC* 1019 (11)

No action in ejectment was brought by the Pullen heirs, or any one else to oust the plaintiff from his possession of said lot. He was left in the undisputed possession thereof notwithstanding he had shown that he was holding same in hostility to any title or claim of the Pullen heirs.

> Even had such a suit been brought and judgment obtained, such "judgment in ejectment, not followed by any writ nor by taking possession under it, does not suspend or interrupt the running of the statute of limitations."
>
> *Mabary vs. Dollarhide*, 98 *Mo.* 198.
>
> *Batterton vs. Chiles* 54 *Am. Dec.* 539.

A judgment to have such an effect must be from the date of the accrual of a right to dispossess by virtue the adverse possession.

R. C. L. p. 718, Sec. 41.

As a general rule the statute of limitations will commence running in favor of an adverse possession from the date of the accrual of a right to dispossess by virtue the adverse possession.

[illegible] 24 W. Va. 291.

In the case of Dice v. Dice, 104 U. S. [illegible] page 441, which bears a similarity to the case at bar, Mr. Justice Day stated: "And for more than ten years after [illegible] was in possession under his grant that it might have maintained an action of ejectment and asserted its title to the premises as against [illegible] adverse claimant. Possession of such duration the statute of limitations, in the foregoing case, barred the right of recovery."

The suit in this case, however, there is no judgment before it because to be considered at all as there is nothing of the kind in the record. In the case as presented the defendant claimed title to the lot in controversy by virtue of a deed executed by the said plaintiff to him as evidenced by [illegible] James E. Pullen, Mary E. Wilson and Thomas L. [illegible] as hereinbefore mentioned as against the [illegible] claim of plaintiff.

It is also contended that this deed conveys any title in greater interest than that of James E. Pullen which [illegible] be so construed hereinbefore

Assuming, therefore, for the sake of argument only, that this deed does convey the undivided one-third interest of Pullen in the lot in controversy, what effect could this trustee's deed have upon the adverse possession of plaintiff since the Spring of 1898? The execution of the trustee's deed to Pullen, et al, did not suspend the operation of the Statute of Limitations. In fact, it may probably be questioned whether the statute really commenced to run until the execution of that deed in 1898.

But, from the time of the execution of that deed vesting the title to said lot in Pullen, et al., the adverse possession of plaintiff certainly became operative and in full blast. See Caflin v. Malone, 50 *Am. Dec.* 526.

This record title was the only means to defeat plaintiff acquiring title by adverse possession, and, yet, nothing was done by the grantees under that deed to oust the plaintiff from his well known adverse possession of said lot in controversy, and any right that the grantees under that deed might have had to oust the plaintiff from his possession had been allowed to slumber all these years notwithstanding it was well known by John G. Heid, agent, that the plaintiff had been, and then was, claiming ownership of the lot in controversy.

From the foregoing, we, therefore, submit that the failure of defendant or his pretended grantors to commence an action to recover possession of said lot under the record title in the Pullen heirs, is now

barred by the Statute of Limitations. Such suit must be brought within the period of the Statute of Limitations, otherwise it is too late.

Hopkins Heirs vs. Calloway, 47 *Tenn.* 37. *I R C. L.* 689.

As the adverse occupant acquires a good title in fee it necessarily follows that possession for the statutory period will bar an action of ejectment by the owner of the paper title.

1 *CYC.* 1137 (11) *citing numerous authorities.*

The Statute of limitations establishes a preemptory and inflexible rule of law which terminates the rights of the legal owner and protects the disseisor in his possession, not out of regard to the merits of the latter's title, but because the real owner has acquiesced in a possession which was adverse for such a length of time that the statute has deprived him of all remedy for the enforcement of his legal title.

Foulke v. Bond 41 *N. J. L.* 527.

See Gatling v. Lane, 22 *N. W.* 453.

Creekmur vs. Creekmur, 75 *Va.* 430.

North P. R. Co. vs. Ely, 25 *Wash* 384.

Title to land under a Federal or State grant may be acquired by adverse possession continued for the statutory period after the grantee acquires the title from the Federal or State Government, and

it is immaterial that the possession shall commence before the title passes.

1 *Cyc.* 1113.

Bicknell v. Comstock, 113 *U. S.* 149; 28 *L. Ed.* 962.

In the case at bar United States patent was issued to the town of Juneau some time prior to the execution of the trustee's deed by the townsite trustee to Pullen et al, and the evidence shows that Waddleton was in possession of the lot in controversy prior to the execution of said trustee's deed.

(2) *That under the pleadings and evidence in this case, the trial court properly instructed the jury to return a verdict for plaintiff for an undivided two-thirds interest in the land in controversy.*

Counsel for defendant assumes a state of facts directly opposite to the issues and evidence in the case and then cites authorities in support of same. In his brief, he states the following proposition, viz:

> "Unless then the plaintiff, Waddleton, showed some sort of title or right of possession of the property, he was not entitled to recover anything from a tenant in common in possession of the entire premises."

But this is not the true premise! We have already shown in this brief that the evidence is, in effect at least, entirely undisputed that the plaintiff had title by adverse possession to the whole of the lot in controversy, and the pleadings and evidence

show that the ouster by defendant was only of a part of said lot, the plaintiff still residing and living thereon. Furthermore that the defendant is not a co-tenant.

The adverse possession of plaintiff vested the fee simple title in him as effectively as if there had been a former conveyance, and as holder of such title so acquired, if ousted from his possession, either by a third person or the former owner or owners, he may maintain an action of ejectment to recover the premises. See 9 R. C. L. Sec. 19;

1 CYC 1135 (B)

Immediately upon defendant ousting plaintiff from possession of part of said lot, plaintiff brought this action in ejectment alleging in his complaint ownership by reason of adverse possession, to which defendant answered denying the allegations of the complaint, excepting as to the possession of plaintiff, and setting up an affirmative defense, wherein it is alleged that the defendant is the owner in fee simple of the whole of said lot and entitled to the possession thereof. Plaintiff in his Reply to said Answer pleads the Statute of Limitations.

Defendant did not plead, defend or justify his entry as tenant in common, or part owner, or on behalf of himself and his co-owners. HE CLAIMED TITLE TO THE WHOLE PROPERTY, NOT ONLY AS AGAINST THE PLAINTIFF, BUT IN ANTAGONISM TO ANY INTEREST WHICH MAY BE CLAIMED BY Mary H. Wilson and Thom

as A. Wilson, the very persons whom he now describes in his brief as his co-tenants.

> If defendant had established title to one-third interest, and was permitted to recover possession of the whole by reason thereof, he would not be estopped to deny the title of the very persons whom he now claims are his co-owners. See King v. Hyatt, 51 Kan. 504.

And the very fact that in this action the defendant did claim to own the interest of Mary H. Wilson and Thomas A. Wilson is sufficient to show that any interest they may claim would be antagonistic to the claim of the defendant.

> Why, then, we ask, should the jury be instructed to return a verdict in favor of defendant for the whole title?

There is no assignment of error based upon the failure of the trial court to instruct the jury "that if they found that defendant was entitled to one-third interest in said lot as a tenant in common, then he was entitled to recover possession of the whole." The error assigned is that the trial court erred in instructing the jury to find in favor of plaintiff for a two-thirds interest. As to whether plaintiff or defendant was entitled to the other one-third was left entirely to the jury to determine, and by their verdict they found in favor of plaintiff and against the defendant.

As hereinbefore stated, the only interest, under

any circumstances, that defendant could be entitled to, is a one-third, and the jury having found he was not entitled to such interest, it necessarily follows that *defendant was not a co-tenant and could not under any view of the law be entitled to possession of the the whole as a co-tenant.*

There is considerable conflict in the law as to whether a co-tenant suing in ejectment is entitled to recover possession of the whole. The reason for this conflict is that the courts of some states look upon the right of possession as the gist of the co-tenant's claim, while the courts of other states regard the title as the main thing to be considered and measure the recovery by the extent of the co-tenant's interest in the property.

See note in 6 L. R. A. (N. S.) 710, 712 and 717.
also note 51 L. R. A. (N. S.) 50.

But in all the cases holding that a co-tenant is entitled to the possession of the whole such co-tenant must represent a better title than the adverse claimant and must establish his title to an aliquot part of the property in dispute.

Dolph v.Barney, 5 *Ore.* 191;
Willians vs. Sutton, 43 *Cal.* 65;
Treat v. Reilly, 35 *Cal.* 129;
Mather vs. Dunn et al, 76 *N. W.* 923;
Le France vs. Richmond, 5 *Sawy*, 601;
Harner vs. Ellis, (*Kan.*) 90 *Pac.* 275.

"The rule that a tenant in common can recover the whole for the benefit of himself and his co-tenants, as against a trespasser, does not apply where

the defendant has clear title as against the co-tenants, by limitation."

Boone v. Knox, 80 *Tex.* 642.

In the case of Gray vs. Givens, 26 Mo. 291, the court says:

> "It often happened, that one tenant in common was barred by limitations, when the other was not and that a title might be acquired by adverse possession. The defendant would prevail against one when he could not against the other. But this would amount to nothing if the plaintiff, not barred and claiming but a fractional interest could recover for the other, *against whom the defendant might have title by lapse of time.*

In 7-R. C. L. 907, referring to the question of one tenant in common being entitled to the possession of the entire estate, it is said:

> "This rule must be limited in its application, however, to those cases where the other cotenants could themselves recover their aliquot parts; and if the rights of some of the co-tenants are barred by the statute of limitations, they could not recover the property and certainly another tenant could not recover for them."

So in this case, it is clear from the evidence that not only is the defendant barred by the statute of limitations, but so also are Mary H. and Thomas A. Wilson, and even had the defendant established an

interest in himself, the fact would still remain from the uncontradicted evidence in this case, that Mary H. and Thomas A. Wilson were barred by the statute of limitations and the defendant could not under any of the authorities recover their interest.

The case of *Williams vs. Coalcreek M. & M. Co.* 6 L. R. A. (N. S.), 711, cited by counsel for defendant, holds that even where a co-tenant does establish his interest, he can recover no more than that interest.

We do not deem it necessary to go further into the question as to whether or not a co-tenant is entitled to recover the whole, for the reason we believe we have fully established that the defendant, having failed to recover the one-third interest, which is the only interest at most he could have any title to, was not and could not be a co-tenant of Mary H. Wilson and Thomas A. Wilson; and defendant having failed to establish any title to the property in controversy and plaintiff having fully established his adverse claim as determined by the verdict of the jury, defendant certainly was not entitled to any instruction for the recovery of the whole or any part of the property in controversy under any interpretation of the law.

(3). *Plaintiff has by his adverse possession acquired fee simple title to said Lot* 6, *Block* 13, *of the town of Juneau, Alaska, and defendant is completely barred by the Statute of Limitations without*

reference to good faith even if the failure to instruct the jury on the question of good faith was assigned as error, which it is not.

Counsel for defendant does not assign as error, nor does he pretend to say that the trial court failed to instruct the jury on the question of good faith, and we submit so far as the Appellate Court is concerned it will be presumed that if such instruction was necessary, the same was given.

As where "good faith" is an essential element it is always a fact to be determined by the jury.

1 CYC 1154.

However, we contend, that the defendant is barred by the Statute of limitations without reference to the good faith of plaintiff, and, in the language of defendant's brief, on page 7, "that plaintiff was entitled to the possession and ownership of the property by limitation."

Sec. 1874, p. 636 of the Compiled Laws of Alaska (being Sec. 1042 of Carter's Alaska Code) provides that "the uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto, except as against the United States."

The foregoing section was passed in the year 1900 and subsequent to the plaintiff going upon the property in controversy, and commencing his adverse possession thereof.

There was no statute of Oregon in 1900, and

there is no statute now, so far as we know similar to the statute above quoted.

Therefore the adverse possession of plaintiff having commenced prior to the passage of the above mentioned statute, the cases from Oregon, under the laws of which state, Alaska was governed prior to the passage of Carter's Alaska Code, should control.

Sec. 838, p. 379 of the Compiled Laws of Alaska (being Sec. 4, p. 146 of Carter's Alaska Code) provides that actions shall be commenced as follows: "Within ten years, actions for the recovery of real property or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action. * * * ".

This last mentioned section is taken from the Laws of Oregon, October 17, 1878, Hill's Ann. Laws, Sec. 4, and was in force in the Territory of Alaska prior to and at the time the plaintiff commenced his adverse possession of the lot in controversy, as the laws of Oregon were adopted as the laws applicable to Alaska by an Act of Congress entitled, "An Act providing for a civil government for Alaska, approved May 17, 1884, 23 St. L. 47, Chap. 78.

If, however, the two statutes aforesaid were both in force at the time of the commencement of the adverse possession of plaintiff, it would not change the situation, *for the reason that plaintiff is claim-*

ing under the latter section, which is purely a statute of limitation.

In the state of Washington they have somewhat similar statutes to the foregoing (Ballinger's Ann. Code and Statutes, Secs. 4797 and 5503) and in the case of Biggart vs. Evans, 36 Wash. 212; 78 Pac. 925, it was stated that the distinguishing features of the Statutes of ten and seven years limitation in Washington is that, under the latter, the adverse possessor must hold under color of title, and in good faith, while under the former, *these are not essential elements.*

See Moore v. Brownfield (*Wash*) 34 *Pac.* 199;
Hesser v. Siepmann (*Wash.*) 76 *Pac.* 295;
Brodack v. Morbach, et al., 80 *Pac.* 275.
Pettigrew v. Greenshields (*Wash.*) 112 *Pac.* 751;
Dibble v. Bellingham Bay Land Co. 163 *U. S.* 63; 41 *L. Ed.* 72.

It is well settled in Oregon that title by adverse possession may be acquired regardless of the good faith of the claimant if accompanied by even a pretense, commonly known as a claim of title.

See Parker v. Metsger, 12 *Ore.* 407;
Joy v. Stump, 14 *Ore.* 361; 12 *Pac.* 929;
Coventon v. Siefert, 23 *Ore.* 548; 32 *Pac.* 508
Oregon Con. Co. v. Allen Ditch Co. 41 *Ore.*, 209; 69 *Pac.* 445;
Gardner v. Wright (*Ore.*) 91 *Pac.* 286.

"To be an adverse possession it must be an oc-

cupancy under a claim of ownership although it need not be under color of title. *It is sufficient if the party goes upon the land, and declares to the world, by his acts and conduct, that he is the owner of it, and maintains that attitude for the requisite period.*"

Swift v. Mulkey, (*Ore.*) 12 *Pac.* 78.

An adverse possession, open, notorious and accompanied with acts of ownership or a claim of ownership for the statutory period, bars an action to recover land, without reference to the good faith or color of title under which the ownership is claimed. *It is the actual claim of ownership, and not the bona fides, that is the test.*

Smith vs. Roberts, 62 *Ala.* 83.
See Charle vs. Saffold, 13 *Tex.* 94;
Link vs. Bland, 95 *S. W.* 1110;
Fitzgerald vs. Brewester, 31 *Neb.* 51;
Carpenter vs. Coles, 75 *Minn.* 9;
Wilkison vs. Eilers, 114 *Mo.* 245.

If good faith was an essential element, the knowledge by plaintiff that trustee's deed had been executed in favor of the Pullen heirs, and that he, the plaintiff, had been unsuccessful in the contest before the Land Department, does not impute bad faith to his entry and adverse possession.

Iowa R. L. Co. vs. Blumer, 206 *U. S.* 484;
51 *L. Ed.* 1148.

The case of Center vs. Cady, 184 Fed. 605, appealed from the Circuit Court for the Western District of Washington, and cited by counsel in his brief,

is a case involving Sec. 5503 of Ball. Ann. Code of the State of Washington, which provides that "every person in open and notorious possession of lands or tenements under claim and color of title, *made in good faith*, who shall, for seven successive years continue in possession," etc.

This is not a case in point as one of the essential requisites in that case under the seven years statute of limitations of the State of Washington is that the claim of title shall be made *in good faith*, but as has been decided by the Supreme Court of that state *good faith is not an essential element under the ten year statute of limitations.* This case could in no event have any application in the case at bar, for *good faith* is not an essential element under the statutes of limitations in Alaska.

The case of Jasperson vs. Scharnikow, 150 Fed. 571, was appealed from the Circuit Court for the Western District of Washington and is cited by counsel for the defendant in his brief. This also is not a case in point for in that case the evidence *failed to show any claim of right or ownership in the adverse claimant when he went upon the land, and, as stated by the court, his entry was without any pretense of having a right as owner of the property.* A comparison between that case and the case at bar will be sufficient to show the glaring difference as to the facts. In the case at bar there can be no question of doubt as to the plaintiff claiming and asserting his ownership to the land from the time of his entry and

during all of the time for more than ten years thereafter, *and this was found as a question of fact by the jury.*

In conclusion, we reiterate that the following propositions are established by the evidence:

First, That the plaintiff went into possession of the disputed premises claiming ownership thereof and has remained in the actual, exclusive, sole, continuous, uninterrupted, open, hostile and adverse possession thereof for more than ten years, at all times claiming to own the same.

Second, That his entry and claim of ownership were in good faith.

Third, That the only title set up to defeat this adverse possession is a *false deed*, purporting to convey the interest of Mary H. and Thomas A. Wilson, by John G. Heid, attorney in fact, without any authority whatever, and the interest of James H. Pullen, by virtue of a power of attorney executed more than twenty years ago, *since which time the said Pullen gave up the property in controversy in disgust and abandoned it and nothing further has been heard from him, and it is not known whether he is living or dead.*

Good faith on the part of plaintiff was shown by the evidence and submitted to the jury under proper instructions, even though not an essential element in the case. It seems to us that *bad faith*, to say the least, on the part of the defendant, is evidenced by his

attempt to claim any title under the deed from John G. Heid, attorney in fact—this in view of the testimony introduced by defendant himself in his effort to sustain the deed.

We are fully aware that much of this brief is unnecessary, for the evidence itself defeats the contentions made by counsel for defendant and the authorities cited in defendant's brief in the light of the testimony in this case seem to us to make this appeal absurd.

Respectfully submitted,
WINN & BURTON,
Attorneys for Defendant in Error